

SOME LEGAL ASPECTS OF INSURANCE
IN THE OFFSHORE OIL INDUSTRY

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I, David Jyh-wen Wang, hereby declare that the thesis
which follows is wholly my own work.

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CHAPTER ONE

INTRODUCTION

The exploration and production of offshore oil have brought into existence varied legal questions heretofore unanswered. With the oil industry being so complex and the development of offshore equipment so rapid, there remain several areas where the existing framework of law and regulation may well be challenged. Already signs of problems in oil-related insurance are emerging, which extend beyond conventional insurance concepts. There is clear support for the view that the severity and breadth of the problems have become far more apparent in recent years.

Offshore oil activities like construction and drilling are highly hazardous operations. Despite the taking of precautions, dangerous occurrences are by no means infrequent. In this connection, it must also be admitted that a single offshore accident can generate potentially sizable losses and claims. This being the case, there is a widespread consensus that no offshore ventures can forego insurance coverages against perils to which the parties may be exposed.

The cover required may differ from case to case depending upon the nature of the operations and the special needs for coverage. However, it is important to bear in mind that there are uninsurable areas of risk where the parties cannot avail themselves of insurance protection. It should be further realised that the sums insured are also subject to the limited extent to which the underwriters are able to offer.

The present work outlines the principal insurance requirements of the offshore oil industry as a basis on which some legal considerations are to apply. An account of the major parties involved in offshore ventures is presented in Chapter 3, followed by a survey of the liability risks confronting those parties. Chapter 4 is an attempt to pinpoint certain problems associated with limitation of liability and employer's liability insurance, central to these problems being the legal status of offshore installations. Coverages against property damage are considered in Chapter 5 along with an assessment of the applicability of the 1906 Marine Insurance Act to oil rig insurance. Pollution liability coverages are the central theme of Chapter 6, with emphasis being laid on the international legal

framework within which oil pollution insurance should be effected. Adding to the complexity are the indemnity provisions incorporated into many offshore contracts, the existence of which can be crucial in implementing offshore insurance contracts. Problems related thereto are examined in Chapter 2 with a review of the relevant statutes and judicial decisions. In addition to the above, the study also illustrates certain significant points by reference to recent tragic events.

One special characteristic of oil-related insurance lies in the fact that one offshore accident may involve various insurance coverages summarised above. While certain perils are coverable under a single package of insurance, some risks can only be insured against under separate policies. In framing offshore insurance programmes, account should always be taken of the way in which the policies apply to the various phases of the operations. Significantly, a feature of certain coverages is that they are compulsory by law, which necessitates special consideration.

A theoretical analysis becomes meaningless when one discovers how different reality is. This being so, a variety of insurance policies currently used or

developed are discussed where relevant, in the hope that a realistic insight may be gained into the nature of the problems. It should however be stressed at the outset that such policies are not necessarily designed for offshore operations.

Several distinctive features have been translated into the policies. Offshore insurance policies can be characterised by the multiplicity of the insureds. Nonetheless, the question as to which party is legally responsible for the purchase of insurance in a given situation demands special attention. It should also be observed that there are areas in which overlapping between the coverages may occur. In considering the form of the policy to be obtained, there has been a clear emphasis on the type of the oil rig being used. As is demonstrated throughout the discussion, the idea of linking the type of the oil rig to the policy is of vital significance. It is almost impossible to work out an insurance scheme without fully appreciating the role of the oil installation on which the operations are carried out.

With offshore technology progressing, the insurance practice in this field is virtually in the process of

evolution. It is pertinent to note that the writer has endeavoured to base the discussion on updated information.

Legally speaking, oil-related coverages are embodied in insurance contracts. However, the insurers' liability may also be incurred indirectly on other relevant agreements associated with the operations, e.g. drilling contracts and joint operating agreements. It is difficult to maintain that legal problems arising therefrom are confined to those which could be overcome by insurance law alone. There are other facets of law to which the legal and insurance practitioners should resort, such as contract, delict, and oil and gas law. As offshore oil operations are of worldwide interest, public and private international law are also heavily involved. All this merely emphasises the sophistication and novelty of offshore insurance coverages. In contrast to conventional insurance, however, there is relatively little judicial authority on oil-related insurance. What creates more difficulty is the fact that the governing law of oil rig insurance policies in the UK jurisdiction has to date been left in serious doubt. It is on this and other significant issues that some comments are made and proposals offered.

As is shown in the present work, many problems which remain unsolved have been magnified by the continuing development of offshore technology. This is too substantial a point to be overlooked.

CHAPTER TWO

INDEMNITY PROVISIONS IN OFFSHORE

CONTRACTS - AN INSURANCE CONSIDERATION

Background

The magnitude of the liability exposure involved in the oil and gas industry, particularly in the offshore area, has been increasingly appreciated. Legal and insurance problems of considerable interest have to date arisen in many cases regarding the contractual distribution of responsibilities and liabilities. Essential to any offshore contract in this connection are the indemnity provisions regulating and establishing the relationship among the parties for purposes of liability. In brief, the principal effect of such agreements is to provide a proper mechanism to allocate all liabilities in the event of any loss or damage arising during the operations. It may be relevant to note that the provisions to such effect are not a novel idea. They are virtually of very wide application and have become a vital ingredient in the legal framework of many commercial activities.

A. Offshore hold-harmless agreements

Indemnity provisions may take various forms. Of particular relevance to offshore oil activities is the one commonly known as the hold-harmless agreement which is almost invariably incorporated into any offshore drilling contract. A hold-harmless agreement is sometimes referred to as an express indemnity¹ whereby one party could, subject to certain exceptions, even eliminate liability for its own negligence.

It is not unusual to find that an offshore accident may give rise to litigation involving all the potential parties. With offshore operations being so complex, however, the responsible party in many cases is not easily identified. To this extent, some contracts may therefore provide that each party to the operation shall be responsible for its own employees and equipment. In other words, both parties have excluded liability as against each other, howsoever such loss or damage may be caused, with each insuring against its own risks. Naturally, parties of stronger bargaining power can avoid or minimise their liabilities under some form

1. As opposed to an implied indemnity.

of hold-harmless agreement even if the loss or damage is occasioned by the negligence, whether sole, joint or concurrent, of the parties themselves. From an operator's standpoint, for example, this might seem justifiable in the sense that the party paying for the operation should be entitled to indemnity as part of the rate charged by the contractors.²

Compared with operations on land, offshore drilling operations are more dependent upon a system of indemnity. For example, it has become standard practice for drilling operations on land that the employer is liable for loss or damage below the ground surface while the contractor³ is liable for that above the ground surface. In the case of offshore drilling operations, however, there

2. Cf. Acomb, "Indemnity As Applied to Offshore Oil Activities," (1966-67) 14 Louisiana Bar Journal 209, at 210.

3. Dunn, "Contracts Relating to Infrastructure and Support Facilities and Services; Employment Contracts and Labour Relations; Agreements for the Construction Maintenance and Operation of Terminals, Tank Farms and Docks; Contracts with Geophysical, Drilling and Other Constructions," Proceedings of the Petroleum Law Seminar, Cambridge (8-13 January 1978) Vol. 1, p. 15.7.

may be argument as to which party should be liable for the area between the sea bed and the sea surface in the absence of a clearly defined clause.⁴

As has been pointed out, indemnity provisions may vary considerably both in form and extent, depending upon the intent of the parties. Generally, those provisions contained in offshore contracts are reciprocal.

B. The factor of negligence

1. A case-law approach

Like any other provision, an indemnity clause may give rise to the question of validity and construction. A further controversial point which always presents much difficulty concerns the factor of negligence. Can parties to an indemnity agreement validly contract to such effect that the indemnitor should indemnify the indemnitee against the indemnitee's own negligence?

In approaching indemnity clauses, the three guidelines laid down by Lord Morton of Henryton in Canada Steamship Lines Ltd. v. The King⁵ can be summarised

4. Ibid.

5. [1952] A.C. 192.

6

as follows:

(1) If the clause contains language which expressly exempts the proferens from the consequence of his own servants' negligence, effect must be given to that provision.

(2) If there is no express reference to the negligence, the court must consider whether the words used are wide enough, in their ordinary meaning, to cover negligence on the part of the servants of the proferens.

(3) If the words used are wide enough for the above purpose, the court must then consider whether the head of damage may be based on some ground other than that of negligence. The "other ground" must not be so fanciful or remote that the proferens cannot be supposed to have desired protection against it.

These principles, which had been stated by Lord
Greene in Alderslade v. Hendon Laundry Ltd.,⁷ were
decided to be applicable to indemnity clauses.⁸ In other

6. Ibid, at p. 208.

7. [1945] K.B. 139, at p. 192.

8. In Canada Steamship there was both an exemption clause

words, the rules governing exemption clauses should
 extend to indemnity clauses.⁹

In North of Scotland Hydro-Electric Board v. D & R
Taylor,¹⁰ the above-mentioned rules were accepted as
 authoritative in the law of Scotland. Following with
 approval the statement by Lord Greene in the Alderslade
 case and the principles set up in Canada Steamship, Lord
 Blades pointed out that the law of Scotland did not
 differ from the law of England in that respect.¹¹ The

and an indemnity clause. The reference by Lord
 Morton to "such clauses" in the sentence preceding
 the tests at p. 208 revealed that the tests were
 meant to apply both to exemption and indemnity clauses.
 This approach was then virtually followed and confirmed
 in subsequent cases. For example, these guidelines
 were explicitly held to apply to a clause of indemnity
 as to an exemption clause since "the one is in
 essence the correlative of the other." Per Buckley
L.J., Gillespie Bros. v. Roy Bowles Transport Ltd.,
 [1973] Q.B. 400, at p. 420.

9. It should however be added that the general principle
 that a bailee may exempt himself from liability for
 the negligence of his servants had been well
 established. See, e.g. Travers & Sons v. Cooper,
 [1915] 1K.B. 73; Rutter v. Palmer, [1922] 2 K.B. 87.
10. 1956 S.C. 1.
11. Ibid, at p. 3.

rule that such clauses should be construed contra proferentem was reiterated. The indemnity provision involved in North of Scotland provided:

"The contractor shall indemnify the Board against all claims from third parties arising from his operations under the contract..."

There was no express reference to negligence. Having found the board solely negligent, the Second Division rejected its claim for indemnification.

Mention must also be made of Gillespie Bros. v. Roy
¹²
Bowles Transport Ltd., another leading case, in which Lord Denning M.R. felt justified in taking the position that the words employed in the indemnity provisions at issue, especially the word "whatsoever", were wide enough to cover negligence. Lending his support to the view expressed by Lord Denning, Buckley L.J. stated that the indemnity clause in dispute did contain an agreement in express terms that the indemnitor should indemnify the indemnitee against all claims and demands including any arising from the negligence of the indemnitee, for the purpose of the first test laid down in Canada

12. [1973] Q.B. 400; supra note 3.

Steamship. These conclusions were reinforced by the proposition Orr L.J. put forward that the word "whatsoever" was itself plainly inconsistent with any exception or qualification.

The rationale of the court's holding in Gillespie failed to gain approval in Smith v. U.M.B. Chrysler
¹³
(Scotland) Ltd., a later House of Lords decision. It was stipulated in the indemnity agreement involved in the case at bar that the suppliers should keep the purchasers indemnified against -

"...(b) Any liability, loss, claim or proceedings whatsoever under Statute or Common Law (i) in respect of personal injury to, or death of, any person whomsoever, (ii) in respect of any injury or damage whatsoever to any property real or personal, arising out of or in the course of or caused by the execution of the order..." (Emphases added)

Allowing the appeal from the suppliers, Lord Fraser of Tullybelton held that this clause was not to be construed as giving the purchasers any indemnity against their own negligence. A clause could not "expressly" exempt or indemnify the proferens against

13. 1978 S.C. (H.L.) 1.

his negligence, his Lordship reasoned, unless it contained the word "negligence" or some synonym for it. The dominant view in the House was that the word "whatsoever" under consideration could not be read as equivalent to an express reference to negligence.¹⁴

2. The Unfair Contract Terms Act 1977

The Act, which came into force on 1st February 1978, has reflected a substantial departure from the rules reviewed above. Part I of the Act which covers England and Wales as well as Northern Ireland provides in section 2(1) as follows:¹⁵

"A person cannot by reference to any contract term or to a notice given to persons generally or to particular persons exclude or restrict his liability for death or personal injury resulting from negligence."

It is therefore clear that an indemnity clause excluding or restricting the indemnitee's liability for death or

14. Such a narrow interpretation provides a stark contrast to the liberal construction of the indemnity provisions involved in The Albion, [1953] 2 All E.R. 679 (C.A.).

15. As distinguished from Scotland which is covered by Part II of the Act. A general part (Part III) is however applicable to both.

personal injury resulting from his own negligence is made completely ineffective by the section as quoted

16

above. In the case of other loss or damage, e.g.

property damage, liability for negligence cannot be

excluded or restricted except in so far as the contract

17

provisions satisfy a test of reasonableness. It is

important to note that insurance contracts are

virtually removed from the scope of the Act.

With the inception of the Act, the general guidance evolving from the judicial decisions previously discussed and a number of other similar decisions, may have become to a very considerable extent less important than it was. Nevertheless, a careful reading of some of the decisions would suggest that they have raised another significant point which merits particular analysis and will be demonstrated later in the Chapter. In the pages that follow, an attempt is made to approach the insurance

16. For detailed analyses of the Act, see Lawson, Exclusion Clauses After the Unfair Contract Terms Act (reprinted with Scottish Supplement 1979); see also Reynolds, "The Unfair Contract Terms Act 1977," (1978) Lloyd's Maritime and Commercial Law Quarterly 201.

17. Section 2(2).

factor already heavily involved in indemnity issues with a view to ascertaining the way this contributing factor and indemnity clauses inter-relate. For this purpose, the afore-mentioned cases will be referred to in greater detail where relevant.

C. Indemnity and insurance

1. Insuring an indemnity clause

Amongst factors which should normally be taken into account for reaching an indemnity agreement is to ensure that the party granting the indemnity has the capability to make the agreement operable. Many, though by no means all, indemnity agreements therefore require that the indemnitor should purchase insurance as an instrument to cover that assumption of liability. It is also essential that the indemnitor procures the proper type of insurance to provide adequate coverage. In the offshore area, drilling and service contracts frequently contain provisions whereby parties oblige themselves to procure insurance which parallels the

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hold-harmless clauses. Some contracts even require

18. E.g. the International Daywork Drilling Contract drafted by the International Association of Drilling

that the certificates of insurance evidencing the required insurance be furnished to ensure that the coverage in line with the indemnity provisions has been purchased. This is of major concern in relation to offshore activities. As will be further noted,¹⁹ a General Comprehensive Liability policy or a P & I policy obtained by a drilling contractor, for example, does not necessarily cover contractual indemnity liability. Thus a separate contractual liability

Contractors (hereinafter the I.A.D.C. contract). The contract is further noted in Chapter 3.

There are similar provisions in offshore service contracts. Referring to a Frigg Field contract on the TCP2 Compression Project, one author points out that by purchasing adequate insurance covering this contractual liability small firms would not be able to compete with larger firms which are financially strong enough to refuse to accept such liability. See Kolrud, "Liability and Indemnities in the Offshore Contracts - Contractors' Viewpoint," in Conference on Contracts and Taxation in the Norwegian North Sea, Bryne, Norway (24, 25 October 1977) pp. 35-41, at p. 38. Nevertheless, it is not unusual to find that the cost of insurance is actually added to the price of the work to be performed. See below, p. 19.

19. See below, Chapter 3.

policy may be desirable. Alternatively, of course, an endorsement to the General Comprehensive Liability policy will suffice in appropriate circumstances.

Once it is decided that the hold-harmless agreement should be insured, the question follows whether the cost of insurance should add to the price of the work to be performed by the indemnitor. Clearly the cost of the indemnitor's services would become expensive by insuring the indemnity provisions and may result in the inclusion of the indemnity being undesirable as far as the²⁰ indemnitee is concerned. In addition to the foregoing, the reluctance on the part of some insurers to accept indemnity liabilities is another main difficulty likely to be encountered.

Insurance carriers who offer the indemnity coverage should always keep in mind their policyholders' relationships with the parties that may be involved.²¹ Their professional advice is of vital importance in assessing

20. Cf. McGillicuddy, "Insurance Coverage in Oil and Gas Operations," (1972) 23rd Annual Institute on Oil and Gas Law and Taxation 111, at p. 119.

21. Some policies require that the indemnity agreements should be presented to and accepted by the insurers

the feasibility of certain insurances. For instance, it is customary in the oil and gas industry for the operator to indemnify the drilling contractor for pollution damage.²² This is one of the risks which contractors cannot insure against. The loss of product due to a blowout, on the other hand, is virtually an uninsurable exposure to risk. It would therefore be pointless to obligate the indemnitor to cover the risk by insurance.

2. Some US decisions

A number of judicial decisions in the United States courts have disclosed complex problems confronting legal and insurance practitioners associated with offshore oil and gas operations. Subsequent paragraphs of this section describe some of the cases which are chiefly related to indemnity clauses.

It seems appropriate to approach the relevant points

before coverage is afforded. For a typical example of such policies, see Sabey, "Indemnity and Insurance Clauses in Joint Venture Farmout and Joint Operating Agreements," (1970) 8 Alberta Law Review 210, at p. 214.

22. See below, Chapter 6.

on a case by case basis by commencing with Bisso v.

²³
Inland Waterways Corp., a landmark case which has been
 the subject of much discussion. In that decision, the
 United States Supreme Court held that a towage agreement
 providing that the tug owner's liability for his own
 negligence should be passed to the owner of the barge
 being towed was unenforceable and invalid.²⁴ The Supreme
 Court indicated that they felt economic pressure was
 being applied by the tug industry against those in
 need of their services. Thus, contractual provisions
 intended to release a tug from liability for its
 negligent towage were invalid as against public policy.
 The court also based its holding on the reasoning that
 wrongdoers should be discouraged from being negligent.²⁵

Of the several decisions following Bisso, Dixilyn
²⁶
Drilling Corp. v. Crescent Towing and Salvage Co. is a

23. 349 U.S. 85 (1955). This case is also the subject of
 a note in (1956) 42 Virginia Law Review 77.

24. Frankfurter J., joined by Reed and Burton JJ.,
 dissented.

25. For a summary of pre-Bisso decisions on the subject,
 see Note, "Admiralty - Exculpatory Clauses in Towage
 Contracts - Public Policy," (1955-56) 30 Tulane Law
Review 133.

26. 372 U.S. 697 (1963).

remarkable one which was decided by the United States Supreme Court in 1963. In that case the parties entered into an agreement providing for the towage of a submersible drilling rig. The towing contract provided that "...any damage claims urged by third parties as well as any claim which may be urged by virtue of damage to the drilling rig in the course of the towage shall be for your [the rig owner] account and account of your underwriters." The contract further stipulated that the amount of insurance coverage should equal the value of the hull policy and amounted to four million dollars as to third-party claims. The drilling barge was then brought into collision with a bridge, giving rise to a subsequent claim by the owner of the bridge. The tug owner contended that all liabilities arising therefrom should rest with the rig owner by virtue of the agreement. In an attempt to distinguish the case from Bisso because of "the peculiar hazards of towage and other factors", the Fifth Circuit reversed the decision in the lower court and held that the tower was entitled to full indemnity from the rig owner and its insurer for all claims of third parties even arising out of the negligence of the tower. However, the Supreme

Court on certiorari rejected the opinion of the Fifth Circuit, indicating that the Bisso decision was still the law and the Fifth Circuit's ruling was squarely in conflict with Bisso.

The rationale of the Supreme Court's holdings in Bisso and Dixilyn was seemingly resisted in the case of Twenty Grand Offshore Inc. v. West India Carriers Inc.²⁷

The primary issue raised was whether the provisions of a towage contract, requiring the owners of a tug and tow to fully insure their respective vessels and to obtain in each of the policies a waiver of subrogation and a designation of the other party as an additional insured, were invalid and unenforceable as exculpatory clauses contrary to public policy. The evidence showed that the tug owner complied with its contractual obligation by having the barge owner named as an additional insured and by securing a waiver of subrogation. The barge owner, however, breached its corresponding obligation. In addition, there was no evidence that the barge owner was over-reached by the tug owner, or that the tug owner was in a position to drive hard bargains.

27. 492 F.2d 679 (5th Cir. 1974).

Regardless of these elements, the United States District Court for the Southern District of Florida held the towage contract invalid. Admitting that the clauses present in Bisso were not insurance clauses, the District Court pointed out however that the sole risk provision in Bisso was exculpatory and against public policy. The towage contract between Twenty Grand and West India, according to the District Court, was an indirect attempt at exculpation because the effect of the waiver clauses was the same as the Bisso-invalid clauses.

The Circuit Court disagreed and reversed, responding that the contention that compulsory insurance clauses were exculpatory per se in the context of Bisso was unsound. Such a doctrinaire interpretation, it went on, was not supported by the reasons undergirding Bisso. The Circuit Court further stated that the towage contract did not relieve the tug owner or the towboat of its liability to the barge owner as the result of the towboat's negligence. Rather, it simply precluded the barge owner's insurance company from suing and recovering from the tug owner losses which it had paid or was obliged to pay to the barge owner on account of an insured casualty. The tug owner's liability to the barge owner was unaffected

by the insurance clauses. The Circuit Court thus concluded that the provisions were not invalid or unenforceable as exculpatory clauses contrary to public policy, and failure of the barge owner to obtain such waiver and designation therefore barred the recovery for damage to the barge as a result of the tug's negligence.

It is evident from the ruling of Twenty Grand that the parties to a maritime towing contract may effectively contract to obligate themselves to carry certain insurance, with the other party to the contract being named as an additional insured and the subrogation against the other party being waived. In essence, the Twenty Grand rule has led to the strong implication that a desired indemnity can be achieved by way of insurance clauses without employing an indemnity clause condemned by Bisso, with the result that the insurer actually becomes the indemnitor.

Accidents in connection with marine towing, as shown in the three decisions examined above, are indicative of the potential hazards involved in offshore oil and gas ventures. In the following cases, some distinctive features other than towing - coupled with indemnity

issues - are also illustrated.

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Aymond v. Texaco, Inc. would appear to be one of the notable decisions in this area. While working on a fixed platform off the Louisiana coast, a member of an oil drilling crew was injured when a steel cable snapped allowing metal tongs to which it was anchored to swing into and damage his knee. He instituted a negligence action against Texaco, the owner of the platform. Texaco as a result filed a third-party complaint against the drilling contractor, with which it had a drilling contract containing the following indemnity language:

"Contractor (Falcon) agrees to protect, indemnify and save Texaco harmless of and from all claims, demands and causes of action in favor of third parties on account of property damage other than property damage expressly described in subparagraph 10(c) above which arises out of the work to be performed by Contractor or Contractor's agents and employees. Contractor also agrees to protect, indemnify and save Texaco harmless of and from all claims, demands, and causes of action in favor of Contractor's employees on account of personal injuries or death or on account of property damage, no matter how such claims arise."

On the indemnification issue, Texaco claimed that the clause "no matter how such claims arise" clearly and

unequivocally indicated that Falcon was to indemnify Texaco for negligence claims by Falcon's employees against Texaco.

Affirming the judgment rendered by the District Court, the Fifth Circuit held that failure to use the word "negligence" and the ambiguity residing in the clause led to the presumption that the indemnitee did not intend indemnity to be given for its own negligence.

The holding in Aymond largely echoed, but should be distinguished from, Stephens v. Chevron Oil Company.²⁹

Again, the contractor's employee suffered injury while disembarking from a boat onto a wharf both owned by Chevron when returning from an offshore platform. The suit was against only Chevron and alleged the negligence of only Chevron.

The contract between Chevron and the contractor included an indemnity clause whereby the contractor agreed:

"...to defend and hold Company (Chevron) indemnified and harmless from and against any loss, expense, claim or demand for: (a) Injury to or death of Contractor's (Axelson) employees...in any way arising out of or

29. 517 F.2d 1123 (5th Cir. 1975).

connected with the performance by Contractor of services hereunder...Company shall have the right, at its option, to participate in the defense of any such suit without relieving Contractor of any obligation hereunder..."

Chevron, after making an offer to Axelson that they should take over the defence which was refused, successfully defended the claim in a jury trial finding that Chevron was free from negligence. As Axelson refused to accept defence of the suit, Chevron filed a third-party action against Axelson and its insurer for indemnification and reimbursement for legal expenses and costs.

Reversing the decision of the District Court, the Circuit Court held that the terms of the indemnity agreement at issue did not entitle Chevron to be indemnified against its own negligence. An intention to indemnify an indemnitee against his own negligence, the court reasoned, would not be presumed in the absence of a clear and specific contractual stipulation to that effect. That followed from the presumption made by Louisiana jurisprudence that one did not normally intend to indemnify another against his own negligence.

Nevertheless, Chevron's negligence had not caused the loss in the case at bar, the court pointed out. The loss was caused because Axelson's employee pressed an invalid legal claim. There was no reason why Chevron should incur the cost of defending against this invalid claim. In the total absence of Chevron's negligence, the court concluded, the manifest intention of the parties was that Axelson would defend and indemnify against work-connected claims.

The judicial attitude reflected in Aymond and Stephens, which is roughly comparable to the corresponding³⁰ English principles enunciated in Canada Steamship, may give way where insurance factors are present. An obvious example would appear to be Day v. Ocean Drilling and Exploration Company,³¹ a 1973 case in the United States District Court for the Eastern District of Louisiana.

Ocean Drilling and Exploration Company (ODECO), a drilling contractor, entered into a service contract with Houma Welders in which a typical indemnity clause was included. By virtue of the contract, Houma Welders

30. Supra note 5.

31. 353 F.Supp. 1350 (E.D. La. 1973).

was to carry employer's liability insurance and comprehensive general liability insurance in stipulated amounts. Such insurances should additionally cover the contractual liabilities and indemnities assumed by Houma with minimum limits of \$300,000. The policies were to waive subrogation against ODECO.

Plaintiff Day, an employee of the sub-contractor Houma, suffered bodily injury as a result of an explosion while passing by a compressor owned and operated by ODECO on a fixed platform.

The court upheld the indemnity, holding that the contract clearly reflected the parties' intention to require Houma to protect ODECO against all risks of harm to Houma's employees, not merely by assuming this risk itself, but by carrying insurance to cover it. Houma was to take out not only comprehensive general liability insurance. Since the contract would cause it to assume risks not normally covered by such insurance, it was to add contractual liability and indemnity coverage. And Houma could have taken the cost of this insurance into account in determining the cost of the work.

Apart from the fact that insurance factors are of

particular importance in assessing the enforceability of indemnity provisions as revealed in the Day case, insurance requirements contained in indemnity clauses may also serve as a decisive test as to the extent to which the indemnitor is liable. Here account should be taken of Dickerson v. Continental Oil Company,³² in which the indemnity provisions provided, inter alia, as follows:

"Comprehensive General Liability Insurance with bodily Injury limits of not less than \$100,000 for one person and \$300,000 for any one accident, and with a property damage limit of not less than \$25,000 for each accident..."

The indemnitee was found liable for awards of a larger amount than \$300,000 as a result of an accident on an offshore oil rig. The court held that the indemnity provisions obligating the indemnitor to obtain general liability insurance with limits of not less than \$300,000 for any one accident clearly stated the limits of the indemnitor's liability, thus limiting the indemnitor's liability to that amount.

Bearing in mind the judgment in Dickerson, specific attention must also be paid to Hicks v. Ocean Drilling

32. 449 F.2d 1209 (5th Cir. 1971).

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and Exploration Co. ODECO, this time the owner of a submersible oil storage facility known as the Round Barge, entered into a master service contract with a contractor which supplied labour crew for the Round Barge. Three employees of the contractor were injured when an accident occurred due to a removal of ballast.

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Jones Act suits were then brought against the contractor and ODECO. ODECO filed cross claims and a third-party action against the labour supplier, seeding indemnity under the master service contract. The contract required the contractor to carry comprehensive general liability insurance. Such insurance, according to the contract, should additionally cover the contractual liabilities and indemnities assumed by the contractor with minimum limits of \$500,000. Attached to the contract between ODECO and the contractor, however, was a certificate of insurance providing for \$300,000 liability coverage. Among other contentions, the supplier argued that the recovery against it by ODECO, if any, should

33. 512 F.2d 817 (5th Cir. 1975).

34. The application of the Jones Act to offshore claims is further discussed in Chapter 4.

be limited to \$300,000. The supplier claimed that the certificate showing insurance of a lesser amount than provided in the contract, and the introduction of the contract in evidence with the certificate attached effected an amendment to the contract. The court, finding no principle of contract amendment, waiver or estoppel to be applicable under the circumstances, held that ODECO was entitled to recover for the full amount of the judgments against it.

Transcontinental Gas Pipe Line Corp. v. The Mobile
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Drilling Barge Mr. Charlie involved a mobile drilling rig. As the rig was towed out to perform drilling operations in the Gulf of Mexico under a Drilling and Rework contract between the rig owner and the lease operator SIGNAL, it submerged and came in contact with a Transcontinental Gas Pipe Line Corporation (TRANSCO) 20-inch gas pipe line buried in that area. It was undisputed both in the trial court and on appeal that TRANSCO was entitled to damages. Having determined that the lease operator and the rig owner were both negligent and that the negligence of each was a proximate

cause of the damage to the pipe line, the court turned to the issue of the proper distribution of the liability as between SIGNAL and the rig owner.

In the indemnity provisions incorporated into the Drilling and Rework contract, the rig owner agreed:

"To protect Company (SIGNAL) against liability for damage, loss or expense arising from damage to property or death of any person or persons arising in any way out of, in connection with or resulting from the work provided for hereunder and, without limiting any of Contractor's obligations or liabilities under this contract, Contractor shall, during the progress of the work and throughout the term of this contract, carry and maintain, at its sole expense, in reliable insurance companies...the minimum insurance coverages set forth in Exhibit B, annexed hereto and made a part of this contract for all purposes..."

Paragraph E of Exhibit B provided:

"Contractor shall indemnify and hold harmless Company and its co-lessees for damages and liabilities of every kind arising out of or being incident to the operations of Contractor hereunder and resulting from the negligence or wilful misconduct of Contractor or its officers, agents or employees. Contractor shall furnish Company with certificates evidencing coverage insuring this hold-harmless agreement...Such insurance shall contain an agreement whereby the insurer waives its right of subrogation against Company and its co-lessees."

The Circuit Court admitted that the contract need not

contain the talismanic words like "even though caused, occasioned or contributed to by the negligence, sole or concurrent of the indemnitee" or like expressions. It must however clearly reflect such a purpose, the court added. Having determined that nothing either in the language of the contract itself or in the situation surrounding its making that clearly indicated the intention to indemnify for the indemnitee's negligence, the court concluded that the lease operator was not entitled to indemnity under that contract.

As to the insurance issue, the court stated that it was not intended to cover the negligence of the indemnitee. Rather, the drilling contractor was to furnish insurance only for its own negligence. The court rejected SIGNAL's argument that because the contractor was to bear the cost of liability insurance, the contract also reflected an intention that the rig owner should bear all the liabilities.

In view of the decisions previously noted, it is felt that the judges' approach to the construction of the indemnity provisions in Transcontinental was to some extent without apparent justification. To put it precisely, the question whether the contractor's insurance

policies actually provided coverage for the indemnity liability should be adequately considered. If, as quite possible in that factual situation, the policies did cover the contractual indemnity liabilities including that against the indemnitee's own negligence, could it not be viewed as a convincing pointer to the parties' intention?

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In Lanasse v. Travelers Insurance Company, a judgment similar to that in Transcontinental - but convincing even though still subject to some criticism - was rendered. It is submitted that the way the court scrupulously dealt with the insurance issue in Lanasse is to a great measure exemplary.

In Lanasse, Chevron Oil Company was the charter of a tender and the operator of the offshore platform Zulu. On April 25, 1964, the tender was operating in the Gulf of Mexico under a written time charter between Cheramie and Chevron. Chevron ordered the vessel to proceed to its platform Zulu for the purpose of moving a welding machine from the west to the east side of the platform. In the performance of the operation, a crew member of

of the vessel was injured due to the negligence of Chevron's crane operator. It was found that the vessel was not unseaworthy and no member of the vessel's crew was guilty of negligence. The District Court entered judgment against Chevron for the full amount paid by the tender owner in settlement of a claim for maintenance and cure and damages asserted by the crewman. Chevron appealed, arguing that even though the mishap had been the result of its own negligence, any resulting liability fell on the vessel owner under the indemnity provisions in the time charter. Chevron's liability, it claimed, was also covered under the terms of the charter. The P & I coverage was expressly extended to Chevron as an additional assured and the underwriters' right of subrogation against Chevron was expressly waived.

According to the indemnity provisions incorporated into the time charter, the vessel owner agreed to indemnify and hold harmless Chevron against any and all claims for damages, whether to person or property, and howsoever arising in any way "directly or indirectly connected with the possession, navigation, management, and operation of the vessel." Agreeing with the

conclusion of the District Court, the Circuit Court stated that the indemnity provisions did not impose on the vessel owner liability for consequences of negligent operation by the charterer's crane operator where crane operation was not even remotely related to operation, navigation or management of the vessel.

The P & I policy in dispute provided:

"In consideration of the premium and subject to the warranties, terms and conditions herein mentioned, this Company hereby undertakes to pay up to the amount hereby insured and in conformity with lines 5 and 6 hereof, such sums as the assured, as owner of the Vessels as per Schedule shall have become legally liable to pay and shall have paid..."
(Emphasis added)

The court found that the vessel and her crew were absolved from all wrong or unseaworthiness. Chevron was found at fault for the manner in which the crane was operated. The vessel, according to the court, offered nothing further than a condition or locale for the accident. The court further indicated that the P & I policy did not cover Chevron's claim because Chevron as an additional assured did not become liable as owner of the vessel.

It should be stressed that Lanasse has once again demonstrated judges' determination to take into

consideration the insurance issues in reaching their judgments. In approving an indemnity, however, it is equally essential that the insurance should closely parallel the indemnity provisions.

The Chief Judge of the Circuit Court in Lanasse raised a question - which was not raised by the parties - arising on the face of the P & I policy. Chevron was an additional assured. It was not allowed to claim the affirmative benefit of the coverage, since the liability imposed was not that of a vessel owner. However, the Chief Judge rightly pointed out, it was a claim by the vessel owner and presumably its underwriters for recoupment of the sums paid to the crewman. If the defence of the vessel owner and part of the settlement was in effect made by the underwriters, then the underwriters could not in their own names recover against Chevron in the face of the policy provision waiving subrogation. The usual rule independent of a contractual provision was that an underwriter could not recover by way of subrogation against its own assured. Thus, the court remanded for a determination of whether this protection was waived by Chevron.

3. A critical review of the English and Scottish cases

Having regard to the relevant decisions in the United States courts, it would seem pertinent to revert to the English and Scottish cases already briefly remarked which had been decided before the introduction of the Unfair Contract Terms Act 1977, with particular reference to the insurance aspects for purposes of clarification and contrast.

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In Canada Steamship, there was no clear reference to negligence in the indemnity provisions under consideration. A fire was occasioned by the negligence of the servants of the Crown (the lessor), causing damage to a shed and consuming all the goods therein owned by the lessee (indemnitor) and third parties.

An insurance clause (clause 9) was incorporated into the lease agreement between the Crown and the lessee to the following effect -

"That the lessee shall, in addition to the payment of the yearly rental hereunder, at its own sole cost and expense, insure, concurrently with the execution of this lease or as soon thereafter as possible, and thereafter keep insured during the currency of this lease with an insurance company

37. Supra note 5.

or companies satisfactory to the Minister of Transport the said shed against fire and other casualty in the sum of ..." (Emphasis added)

Among other contentions, counsel for the Crown relied on the fact that under clause 9 of the agreement the lessee was bound to insure the shed, as an indication that the Crown did not intend to be liable for any damage howsoever it might arise. In considering this point, the court admitted that this argument was not without force as applied to the shed. The insurance clause made no reference to the goods within the shed, however, which gave rise to the action.

Judging from the reasoning underlying the decision in so far as the insurance issue is concerned, it may reasonably be inferred - though not explicitly declared by the court - that the insurance requirements, being connected with indemnity clauses in one way or another, should be given weight by courts in deciding the validity of the indemnity clauses and the extent to which the indemnity clauses are meant to cover.

At this point, nevertheless, it is important to inquire whether the court would have reached a different decision in the Canada Steamship case, had clause 9 in that case required the goods as well as the shed to be

insured. Whatever the answer may be, it should be indicated that what an indemnitor owes to an indemnitee under an indemnity agreement is, in a strict legal sense, a contractual liability. It follows therefore that any other insurance arrangement than a liability coverage parallel to that effect would appear to be of relatively little assistance in reflecting the genuine intention of the parties to the indemnity agreement.³⁸

The insurance issue, which was not raised in the ³⁹North of Scotland case, was again encountered in ⁴⁰Gillespie Bros. v. Roy Bowles Transport Ltd.

Gillespie Brothers ordered three watches from Swiss manufacturers which were for resale to other buyers. When the parcel containing the watches arrived in London, Gillespie Brothers asked their forwarding agents to arrange for the trans-shipment. The forwarding

38. The insurance arrangements purporting to cover the contractual indemnities in the above-mentioned US decisions are clearly supportive of this proposition. However, it does not follow that such coverages are available under any liability policy. See Chapter 3.

39. Supra note 10.

40. Supra note 12.

agents for this purpose hired a van and a driver from Roy Bowles, the carriers, with the driver remaining the carriers' servant. The parcel was then stolen from the van while the driver was signing for it in the warehouse. Upon the finding that the driver had been negligent, the owners (Gillespie Brothers) succeeded in an action against the carriers for the value of the parcel and interest thereon.

The carriers brought third-party proceedings claiming to be indemnified by the forwarding agents under clause 3(4) of the Road Haulage Association's⁴¹ Conditions of Carriage which were incorporated into the contract between the carriers and the forwarding agents.

By clause 3(4) it was provided that the forwarding agents should save harmless and keep the carriers indemnified against all claims or demands whatsoever made in excess of the carriers' liability under the conditions.

41. The Road Haulage Association's Conditions of Carriage were directly at issue in a recent case, see Acme Transport v. Betts, [1981] 1 Lloyd's Rep. 131.

Apart from the construction issue already discussed above, lawyers for the carriers took the position that parties should be given the certainty enabling them to be aware of the area where a particular risk might fall and to insure accordingly. If there was an uncertainty due to the interpretation of the conditions which were standard throughout the industry and which were often incorporated by reference into contracts, then each party in the present case might insure against the same risk, thereby increasing the cost to the customers. The main instrument to eliminate double insurance, as the lawyers put it, was the indemnity clause.⁴² They further pointed out that for some loads the customer did not bother to take out insurance since he knew that he had an absolute cover against the carrier; but if the customer had a very valuable load it was right that he should pay the premium for the excess above the carrier's liability, in this case £300 a ton.

It was however asserted by counsel for the forwarding agents that the position of the forwarding agents vis-a-vis insurance was that they would need to have,

42. Supra note 12, at p. 405.

if the carriers were right (i) a general policy to cover the goods handled - which might be difficult to obtain, or (ii) a special policy each time they received a consignment. This in turn would mean that even before they took delivery of the goods they would have the insurance burden which ought to be borne by the carriers who were already covered by insurers who knew. That did not make for fairness.⁴³

In disposing of the insurance issue, Lord Denning reminded the parties that it had been the common practice of carriers to make conditions limiting their liability to specific sums and to leave the goods owner to insure if he wanted greater cover. Carriers based their charges - and the insurers calculated their premiums - on the footing that the limitation was valid and effective between all concerned. According to Lord Denning, the law should support this course of trade and uphold the limitation.⁴⁴

43. Supra note 12, at p. 407.

44. At p. 412.

Some observations and comments derive from the contentions by the lawyers representing the two sides. In brief, it is probably true to say that counsel for the forwarding agents erred in directing his assertion at the availability and feasibility of the insurance covering indemnity liability. They should in no event be viewed as a determining factor as to the liability of the parties. Inasmuch as the incorporation of the indemnity provision into the standard conditions may very likely impose potential liabilities upon the forwarding agents, they must have considered whether they should in the end resort to a liability policy of one form or another, even though the carriers' negligence is excluded from the coverage. Alternatively, they could opt to self-insure the risk - as apparently the case - and assume any resulting consequence.

Lawyers for the carriers took the view - seemingly endorsed by Lord Denning - that the main instrument to eliminate double insurance was the indemnity clause. In putting forward this proposition, it may be thought that they were avoiding another accusation that failure by the carriers clearly to refer to negligence in the

standard clause was actually the main cause of double insurance, if any. In other words, had the word "negligence" been inserted in the clause, then both the carriers and the forwarding agents would have discerned their respective liability. To that extent, double insurance would be a remote possibility.

Opinion among the law lords was divided on the insurance question in Smith v. U.M.B. Chrysler (Scotland)⁴⁵ Ltd., in which William Smith, an electrician employed by the suppliers, brought an action against U.M.B. Chrysler (purchasers) for reparation for personal injuries due to an accident wholly caused by negligence on the part of the purchasers. The purchasers claimed against the suppliers both a contribution under the Law Reform (Miscellaneous Provisions)(Scotland) Act 1940 and also a contractual indemnity in respect of any damages and expenses which they might be found liable to pay to the injured electrician.

Insurance requirements were stipulated in the indemnity clause whereby the suppliers should "insure against and cause all sub-contractors to insure against

45. Supra note 13.

their liability hereunder", and should also produce to the purchasers on demand the policies of insurance with current renewal receipts therefor.

Lord Fraser viewed the provisions dealing with insurance as obscure.⁴⁶ Noting that reference to sub-contractors insuring against their liability under the clause was inept as no sub-contractors were parties to the contract, his Lordship held that the insurance provisions were intended to cover the liabilities of both the suppliers and sub-contractors, if any, arising from their respective acts or omissions. Otherwise the effect of the insurance provisions would be to require double - or multiple - insurance by the suppliers and sub-contractors against liability arising from acts or omissions of any party including the purchasers. It seemed to Lord Fraser "most unlikely" that this could have been intended.⁴⁷

Obscure as the provisions may be, it should however be remarked that the "most unlikely" insurance arrangement, as Lord Fraser termed it, had been

46. Supra note 13, at p. 13.

47. At p. 14.

associated with a number of commercial activities, of which the oil industry is a remarkable example.

Lord Keith of Kinkel opined that the insurance provisions were extremely difficult of construction. It was very uncertain whether "their liability hereunder" referred to liability under the indemnity clause or general liability that might be incurred by reason of the contract. In his concluding remarks, Lord Keith stated that the insurance provisions were not in any event significant for the purpose of ascertaining the extent of indemnity obligation.⁴⁸

It is of little doubt that Lord Keith's proposition in this regard may invite criticism, in view of an appraisal of the different but significant roles the insurance factors played in the United States decisions previously discussed.

4. Taking the 1977 Act into account

The inception of the Unfair Contract Terms Act 1977,⁴⁹ as noted above, has changed the situation drastically. A reading of section 2 in Part I of the Act would

48. Supra note 13, at p. 18.

49. See above, p. 15.

suggest that an indemnity agreement excluding liability resulting from the indemnitee's own negligence is⁵⁰ unenforceable whether or not there is in behind an insurance coverage guarding against that liability. The insurance coverage, being unaffected by the Act,⁵¹ would unfortunately be of little practical function. Against such a legal background, there seem to be two options open to the indemnitee. He can protect himself either by obtaining his own policy covering liability for death or personal injury resulting from his own negligence, or by naming himself as an additional assured in the⁵² indemnitor's policy.

It is therefore submitted - tentative as it may be - that in view of the insurability of the contractual liability against indemnitees' negligence, indemnity agreements indemnifying indemnitees' own negligence

50. Subject to certain exceptions with which the present discussion does not intend to deal in detail.

51. Schedule 1, s. 1(a).

52. See below, p. 59.

should be given effect if the agreements are fully insured to that extent. To do this would further strengthen the idea that parties can successfully pass their negligence liability to their insurers, as has been clearly reflected in the proviso that the 1977 Act does ~~not~~ extend to insurance contracts.

From a practical standpoint, the extent to which the indemnity provisions inserted in offshore contracts can be affected by the 1977 Act still remains undecided. Judicially, there are signs that the insurance factor has been given increasing weight in situations involving contractual allocation of liabilities, one manifestation being Photo Production Ltd. v. Securicor Transport Ltd.,⁵³ a recent House of Lords decision.

The contract containing an exclusion clause involved in the case was entered into before the passing of the 1977 Act. Although the decision in favour of the contractual distribution of responsibilities was based solely on the common law of contract, the law lords did

53. [1980] 2 W.L.R. 283 (H.L.(E.)). This case was referred to in the judgment of Port Jackson Ltd. v. Salmon & Spraggon Ltd., [1981] 1 W.L.R. 138.



make some reference to the effect of the 1977 Act. The following passages are taken from the judgment of Lord

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Wilberforce:

"But since then Parliament has taken a hand: it has passed the Unfair Contract Terms Act 1977. This Act applies to consumer contracts and those based on standard terms and enables exception clauses to be applied with regard to what is just and reasonable. It is significant that Parliament refrained from legislating over the whole field of contract. After this Act, in commercial matters generally, when the parties are not of unequally bargaining power, and when risks are normally borne by insurance, but only is the case for judicial intervention undemonstrated, but there is everything to be said, and this seems to have been Parliament's intention, for leaving the parties free to apportion the risks as they think fit for respecting their decisions." (Emphases added)

The proposition Lord Diplock put forward is equally

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noteworthy:

"In commercial contracts negotiated between businessmen capable of looking after their own interests and of deciding how risks inherent in the performance of various kinds of contract can be most economically borne (generally by insurance), it is, in my view, wrong to place a strained construction upon words in an exclusion clause which are clear and fairly susceptible of one meaning only even after due

54. Supra note 53, at p. 289.

55. At p. 296.

allowance has been made for the presumption in favour of the implied primary and secondary obligations..." (Emphases added)

It seems plain enough that the opinion expressed by their Lordships has reinforced the belief already advocated by the writer in the unique relationship between insurance and contractual allocation of liabilities. Nevertheless, it is not easy to assess whether the decision is an indication of the willingness and seriousness with which the courts are to deal with the indemnity provisions involved in offshore contracts. Is it a safe assumption that judicial intervention in that instance will remain "undemonstrated"? Is it the willingness of the courts, rather than the Act itself, or both, that will be decisive?

D. Some further observations

1. Waiver of subrogation

Two further relevant points which appear to present some difficulty concern waiver of subrogation and naming the indemnitee as an additional assured in the indemnitor's policy.

It should be realised that insurance contracts and indemnity clauses are different and independent agreements. In instances involving both indemnity and

and insurance, these two different agreements are related to, but separate from, each other. An insurer, on the other hand, is in normal circumstances not a party to an indemnity agreement which is entered into between the indemnitor and the indemnitee. Therefore, the insurer's right of subrogation against the indemnitee is not automatically affected unless the waiver of subrogation is granted.

Where waiver of subrogation is required in the indemnity agreement and the waiver is effectively obtained from the insurer,⁵⁶ the insurer loses its right of subrogation. The same applies when the insurer waives its right for one reason or another without the indemnity agreement so requiring.⁵⁷

A rather different and observable situation may emerge in which the waiver is stipulated in the agreement

56. The insurer can waive its right of subrogation by agreement with the insured. See, e.g. Thomas & Co. v. Brown, (1899) 4 Com. Cas. 186.

57. Such a waiver in the present context should however be distinguished from the situation in which insurers waive their rights of subrogation by agreement with other insurers. Cf. Birds, "Contractual Subrogation in Insurance," (1979) The Journal of Business Law p. 126.

and the indemnitor fails to procure it from the insurer.

The indemnitor in this case may be liable for damage arising therefrom as he breaches his contractual obligation towards the indemnitee, whereas the insurer is not barred from exercising its right.

While it is beyond the purview of this Chapter to consider the extent to which an insurer may exercise its right of subrogation against an indemnitee, it seems relevant to discuss the decision in State Government Insurance Office v. Brisbane Stevedoring Pty. Ltd.⁵⁹

A worker was awarded damages for personal injuries sustained by him against his employer and the owner of a mobile crane. Both the employer and the owner were found negligent. The mobile crane, with its driver, was hired by the employer under an agreement containing an indemnity clause whereby the employer agreed to indemnify the crane owner from all or any claims for injury arising out of the use of the crane. The court apportioned responsibility between the employer and the owner. Holding the indemnity clause enforceable, the

58. E.g. Twenty Grand Offshore, Inc. v. West India Carriers, Inc., supra note 27.

59. (1969) 123 C.L.R. 228.

court ordered the employer to indemnify the crane owner, and ordered the employer's insurer which was joined in the action as a third party to indemnify the employer completely.

The insurer (appellant) disclaimed its liability, contending, among others, that by entering into the hiring agreement which contained an indemnity clause preventing the employer from being able to assert a right of contribution, the employer was in breach of a duty which it owed to its insurer not to defeat or diminish the rights to which the insurer might become entitled by way of subrogation.

The court rejected the insurer's contention by stating that nothing in the policy or in the general law required the employer to create rights for the benefit of the insurer. To hire a crane in terms that it should acquire no rights against the crane owner was not in breach of any obligation resting on him. Where an insurance was effected without disclosure of an arrangement whereby a possible future right of the insurer to have recourse against a third party was negated, the court went on, the question whether the non-disclosure was a concealment of a material fact

depended upon whether the insurer, to the knowledge of the insured, was accustomed to charge a higher premium in a case where there was to be no right of recourse than in a case where there was to be such a right.

As the information available in the holding failed to throw ample light on the exact relationship between the indemnity clause and the insurance coverage in dispute, an exhaustive analysis in this respect may prove to be impossible and impractical. Having said that, nevertheless, the very proposition that "nothing in the policy or in the general law required the employer to create rights for the benefit of the insurer" would merit some remarks. It should be conceded that an insured has no obligations whatsoever to create rights for the benefit of his insurer. It is however equally true that the insured must do no act by which the insurer may be prejudiced and ensure that the insurer enjoys the full benefit of subrogation⁶⁰ which is inherent in the insurer's disposition. As has

60. See Ivamy, General Principles of Insurance Law (4th ed. 1979) pp. 508, 509.

been hinted at in the foregoing discussion an insurance coverage parallel to an indemnity agreement is fairly difficult to procure. This may also be evidenced by the fact that comprehensive general liability policies normally exclude this particular risk.⁶¹ And insurers would hardly give up their right of subrogation against the indemnitees without adequate consideration, e.g. much higher premium. It would therefore be unfair and misleading if the presumption derived from that proposition in favour of insureds should prevail in a typical insurance-indemnity axis as has been repeatedly illustrated. As a matter of fact, even though an insurer has granted the waiver of subrogation in a indemnity-associated situation, he may still resist his commitment, thus further complicating the picture.

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Fluor Western Inc. v. G & H Offshore Towing Co. Inc.,
another United States case, may be viewed as representative of a set of decisions sharing the same nature.

In Fluor, the underwriters argued that the waiver

61. See below, Chapter 3.

62. 447 F.2d 35 (5th Cir. 1971).

of subrogation in effect absolved the towing company (indemnitee) of responsibility for negligence and this was inconsistent with the Bisso-Dixilyn rule.⁶³ Having found no evidence showing that the waiver of subrogation resulted from an unconscionable inequality in bargaining positions, the court rejected that contention, holding that the Bisso rule was not applicable in that situation.

2. Naming the indemnitee as an additional assured

It remains to be decided whether naming the indemnitee as an additional assured in the indemnitor's policy is practically desirable in any instance,⁶⁴ bearing in mind, for example, the decision in Stolberg v. Pearl Assurance.⁶⁵

Pearl Assurance issued a policy covering S.M.C.O. and two other insureds in respect of liability for

63. See above, pp. 21-23.

64. For an affirmative view, which is not shared by the writer of this work, see Hancock, "Some Pitfalls in Liability, Indemnification, and Insurance Clauses in Drilling and Service Contracts," (1973) 24 Rocky Mountain Mineral Law Institute 535, at p. 662. Cf. "North Sea Problems," Insurance Vol. 2, No. 1 (Jan. 1975) p. 24.

65. [1970] 2 Lloyd's Rep. 421.

bodily injury and death. An enforcement to that policy was then issued which added Stolberg (plaintiff) as an additional assured. In April 1965, when the policy was in effect, an employee of S.M.C.O. was killed due to negligence of Stolberg. Stolberg claimed indemnity from Pearl Assurance for damages awarded against him in respect of the death of the employee. The defendant insurer disclaimed the liability, pleading a policy condition which excluded liability in respect of bodily injury and death sustained "by any employee of the Insured..."

Plaintiff argued that the exclusion covered only employees of the "Insured". Inasmuch as he was the insured and the employee was not employed by him but by S.M.C.O., the exclusion clause was inapplicable.

The British Columbia Supreme Court, rejecting the plaintiff's contention, stated that the plaintiff confused the situation by identifying the words "the Insured" with the word claimant. "The Insured" under the policy at issue included the plaintiff and three other companies. Stolberg, although the only claimant, was not the only insured. On a fair reading of the whole policy, the court reasoned, it was clear that the

intention of the exclusion clause was to exclude claims made in respect of liability to any employee of the three companies named as "Insured". The liability in respect of the death of that employee was meant to be excluded.

Account must also be taken of a hypothetical situation in which the policy excludes the liability arising from the insured's own negligence. While the indemnitee, expecting additional security by adding his name in the policy, happens to be negligent, the insurer would not hesitate to disclaim its liability in that the indemnitee is also a named assured. Thus the resulting effect would probably be different from that as desired.

E. Concluding Remarks

The present discussion has sought to show the potentially decisive importance of the insurance factor in implementing indemnity clauses, which have been regarded by parties interested in offshore ventures as a necessary means of allocating liabilities and responsibilities. Clearly the validity of indemnity provisions and the extent to which they are legally enforceable are a point on which offshore underwriters

and their assureds are sensitive. With contractual indemnity likely to remain a dominant feature in offshore oil-related activities,⁶⁶ it may appear rational to minimise legal constraints whatsoever upon such widely-adopted practices, as long as back-up insurance coverages are obtainable. In this particular respect, the Unfair Contract Terms Act 1977 seems to have given cause for disquiet.

In drafting an indemnity clause, it is important to

66. Offshore contractual indemnities have recently been extended to cases like Tharos, a Japanese-built semi-submersible with advanced fire-fighting, emergency support, maintenance and diving facilities. It has been reported that the Occidental North Sea consortium, the owner of the Tharos, tried to form an "insurance club" which would allow other nearby operators emergency use of the rig at a rate well below the estimated £140,000 a day it would normally cost third parties. In return "club" members would pay a portion of the rig's operating cost and be required to sign cross indemnification agreements which would relieve the Tharos owner of responsibility for damage caused to a rig or platform while answering an emergency call. See Financial Times, February 13, 1980, p. 9.

ensure that the insurance protection behind the scene operates in a constructive and parallel way rather than obscure the purpose to be intended. Nevertheless, such precautions alone cannot totally relieve the concern of parties to an indemnity agreement without also a helping hand from the courts. While there can be no assurance that the courts would honour any contractual indemnity, their determination of fully scrutinizing the insurance element involved therein could be a significant comfort to offshore venturers.

Taken as a whole, the guidelines deducible from the United States decisions in considering an indemnity-insurance axis cannot merit too much emphasis. To this extent, the lengthy description elsewhere in the Chapter of those cases seems worthwhile.

Broadly, it would appear that the insurance aspect associated with contractual indemnity has so far been more significant than the British courts have acknowledged. In the offshore area, on the other hand, there are instances in which the point under consideration still remains perhaps a somewhat unknown factor, which is resistant to change. Nowhere is this indifference more obvious than in the model clauses contained in the

present UK production and exploration licences. It is stipulated in the licences that the licensee "shall at all times keep the Minister effectually indemnified against all actions proceedings cost charges claims and demands whatsoever which may be made or brought against the Minister by any third party in relation to or in connection with this licence or any matter or thing done or purported to be done in pursuance thereof."⁶⁷ If there is any defect in the clause, apart from its enforceability under the 1977 Act, it is that no insurance is required throughout the model clauses to keep these indemnity clauses effectual. While there has been a clear tendency in the United States jurisdiction to treat an insurance-backed indemnity as the norm, such an attitude has not generally been adopted in the UK.

67. Cl. 37 of the Model Clauses for production licences in seaward areas and cl. 19 of the Model Clauses for exploration licences in seaward areas.

CHAPTER THREE

INSURING AGAINST LIABILITIES OF THE MAJOR
PARTIES INVOLVED IN OFFSHORE OPERATIONSA. The operator and other participants in a joint venture

With the sums of money involved in the oil and gas industry being astronomical, almost all offshore exploration and production operations have been carried out on a joint venture basis. The contractual arrangements made between the co-licensees under a licence are usually embodied in an agreement, commonly called the joint operating agreement,¹ within which the respective interests in the venture and the manner in which the operation should be conducted, are agreed upon. As a

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1. Joint operating agreements are fully considered in MacWilliam and Muir, "Offshore Operating Agreements," (1973) 11 Alberta Law Review 503; Bond and Webb, "UK Offshore Operating Agreements," The Law Society's Gazette (11 January 1978) pp. 10, 11; Hill, "Joint Operating Agreements," Proceedings of the Petroleum Law Seminar, Cambridge (8-13 January 1978) Vol. 1, paper 14. For a recent judicial decision involving an operating agreement, see B.P. Exploration Co. (Libya) Ltd. v. Hunt (No. 2), [1981] 1 W.L.R. 232 (C.A.).

matter of fact, a certain degree of uniformity to date has been achieved in joint operating agreements, with very limited variations to meet particular circumstances. The purchase of insurance, which is essential to any offshore venture, is also specified in a typical operating agreement.

It is the invariable practice for the parties to a joint operating agreement to designate one of the participant to conduct all the operations on behalf of the co-venturers. In the United Kingdom, the granting of a production licence is conditional upon the appointment of such a participant - now familiarly known as the operator - satisfactory to the Secretary of State for Energy.²

It is outside the scope of this work to enter into a detailed exposition of the legal status of the operator. Broadly speaking, however, the operator should act in the capacity of a principal in its relations with third parties in appropriate circumstances so that the inconvenience of the non-operators being

2. The Petroleum (Production) Regulations 1976, Schedule 5, cl. 22(1), as amended by the Petroleum (Production) (Amendment) Regulations 1978, S.I. 1978, No. 929.

directly involved in any potential dispute can be minimised.³ Among other obligation, the responsibility for insurance is usually vested in the operator.

As the operator is in most cases not remunerated by non-operators, a question of major importance arises as to whether the operator should be solely liable for damage to third parties. The answer to this depends mainly upon the wording of the operating agreement and could vary from case to case. In principle, the operator should not be liable in excess of its participating interest share.⁴ The view is now spreading that liabilities incurred by the operator towards thirds parties could be charged to non-operators. To this extent, the operator's liability insurer, after indemnifying the loss, becomes subrogated to the rights of the operator against other co-venturers.

In conducting the operations, the operator is equally likely to incur liabilities to the non-operators. An insurance coverage covering such

3. Hill, op cit (supra note 1) at p. 14.5; cf. Daintith and Willoughby (eds.), A Manual of United Kingdom Oil and Gas Law (1977) p. 44.

4. Hill, op cit (supra note 1), at p. 14.9.

liabilities would be desirable. In this connection, a particularly noteworthy point is that under the Third Parties (Rights Against Insurers) Act 1930 the operator's rights against its insurer shall be conferred on the co-venturers in the event of the operator being insolvent or in certain other events.⁵

Subject to certain conditions, complete withdrawal⁶ by a participant - even by the operator - from the licence and the joint venture is normally allowable. In the wake of the recent disasters in the offshore⁷ area, it is hardly surprising that there has been a marked tendency towards increasing the control over the operator by non-operators. These tragic events,

5. The Third Parties (Rights against Insurers) Act 1930, s. 1(1)(b).

6. For example, the American operator Mesa Petroleum of the Beatrice field has sold all its UK interests to the British National Oil Corporation, as reported in Financial Times, April 4, 1979, p. 1.

7. E.g. the Ixtoc I blowout and the Alexander Kielland disaster. See below, Chapter 5.

accompanied by a number of problems unsolved, have highlighted the importance of liability insurances involved in offshore ventures, which will be examined in the later part of this Chapter.

B. Contractors and sub-contractors

1. Independent contractors, generally

The majority of offshore drilling and service contracts contain an independent contractor clause clearly stating that the contractor is an "independent contractor" free of control or supervision by the employer (operator) as to the means or manner of performing a particular work.⁸ This clause is of particular interest to parties concerned with the oil and gas industry, in that an employer in general is not liable for the negligence of his independent contractor to the same extent as he is liable for the negligence of his own servants.⁹ Where a negligent

8. Some contracts only stipulate that contractors in performing their obligations shall be independent contractors, without giving further definitio or explanation thereof. See, for example, art. I, cl. 106 of the I.A.D.C. contract, which has been briefly noted above at p. 17, note 18 and is further discussed elsewhere in this Chapter.

9. See Munkman, Employer's Liability at Common Law (8th ed. 1975) p. 96.

act is committed by an independent contractor, in other words, it does not of itself render the employer¹⁰ liable.

In most cases, an employer is not responsible for the delicts of his independent contractor.¹¹ Nor is he liable for any tort committed by the servants whom the independent contractor may have engaged for the actual performance of the work.¹² However, the mere fact that the act complained of is one delegated to an independent contractor does not excuse the employer from his own negligence, subject of course to a valid indemnity agreement.

While an employer is under a statutory obligation to execute a particular work and entrusts the execution of the work to an independent contractor, he is still

10. 28 Halsbury's Laws of England (3rd ed.) 23, with cases.

11. E.g. Johnston v. Mills, (1917) 37 D.L.R. 767.

12. The judicial authorities include Penny v. Wimbledon Urban Council, [1899] 2 Q.B. 72, C.A.; Holliday v. National Telephone Co., [1899] 2 Q.B. 392, C.A.

responsible to third parties for any injury sustained by them in consequence of the improper execution of the work by the independent contractor.¹³ In addition, an employer cannot escape from his personal duty of care. It has been held that an employer's personal duty cannot be delegated so as to divest him of responsibility as far as it concerns plant, place of work and method of work.¹⁴ It is therefore clear that by means of an independent contractor clause incorporated into an offshore contract, the operator may well be delegating at least part of his duty to the independent contractor as long as the performance of the contract does not involve the operator's personal duty.¹⁵

2. "Control"

The distinction between an independent contractor

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13. Hardaker v. Idle District Council, [1896] 1 Q.B. 335, C.A.; Robinson v. Beaconsfield Rural Council, [1911] 2 Ch. 188, C.A.
 14. Wilsons and Clyde Coal Co. Ltd. v. English, [1938] A.C. 57; [1937] 3 All E.R. 628. Scottish cases include Baird v. Addie, (1854) 16 D. 490; Macdonald v. Wyllie, (1898) 1 F. 339.
 15. The same conclusion has been reached by Kitchen in his book Labour Law and Off-shore Oil (1977) p. 151.

and a servant is virtually a question of both law and fact. The most decisive test, which has been generally accepted and supported by a number of decisions, lies in the nature and degree of control on the part of the employer over the performance of the contract.¹⁶ So far as the oil industry is concerned, particular reference may be made to Marine Pipeline & Dredging Ltd. v.

Canadian Fina Oil Ltd.¹⁷ Nevertheless, it is exactly this factor of "control" which has proved to be most controversial as applied to offshore activities, particularly drilling. The problem that frequently arises in practice is whether the employer's act in co-ordination with the contractor has resulted in some form of control over the work undertaken by the

16. Performing Right Soc. Ltd. v. Mitchell & Booker (Palais De Danse), Ltd., [1924] 1 K.B. 762; Short v. J.W. Henderson, Ltd., [1946] S.C. (H.L.) 24, at p. 34; Gould v. Minister of National Insurance, [1951] 1 K.B. 731, at p. 734.

17. 46 D.L.R. (2d) 495.

It may be relevant to note that in Newspapers Inc. v. Love, 380 S.W. 2d 582 (Tex. 1964), the Supreme Court of Texas held that testimony as to actual control was evidentiary only, and that it was the right of control rather than actual control which was the ultimate legal issue for determination.

contractor and thereby destroyed that unique relation-
¹⁸ship. This is largely attributable to the fact that
 in many cases the contractor is obligated under the
 contract to perform certain functions as "required" or
 "directed" by the operator. And there are occasions
 upon which the operator will furnish materials or
 equipment and its inspectors or technical supervisors
 will consult with the contractor concerning the work
 being performed. However, the right to inspect without
 actually controlling the work does not in any way affect
¹⁹the status of an independent contractor. It has been
 suggested that a drilling contract can create the status
 of an independent contractor for some acts in the drilling
²⁰operation and refrain from doing so as to other parts.

3. Exceptions to general rules

It should be noted that there are some other
 circumstances in which the employer is still liable
 to certain extent for acts committed by his independent
 contractor, whilst the employer-independent contractor

18. Cf. "The Liability of a Drilling Contractor," (1966)
 5 Alberta Law Review 108, at p. 116.

19. Ibid, at p. 117.

20. Ibid.

relationship remains unaffected. Of particular
 relevance to the oil industry is Rylands v. Fletcher,²¹
 a landmark case which deserves mention.

In brief, the litigation arose when the owners of
 a land employed independent contractors to construct
 a reservoir on their land. In the course of the work,
 the contractors struck some old shafts connected with
 the mines of a neighbour. When the reservoir was
 completed the water burst through the shafts and
 flooded the neighbour's mines. The owners of the land
 were found not negligent, yet the contractors had been.
 The court held the owners liable even though there was
 no fault on their part.

The Rylands rule has been applied to impose
 liability for the escape of water, electricity, gas,
 oil, fire and explosions.²² Be that as it may, there
 has been controversy as to how far the rule is applicable

21. [1866] L.R. 1 Ex. 265, affd. [1868] L.R. 3 H.L. 330.

22. For recent cases applying the rule of Rylands v. Fletcher, see 36(1) Law Digest 448.

²³
in Scotland. Broadly, the liability under the Rylands rule is strict and it is no defence that the object escaped without the owner's (employer) wilful act, default or neglect, or even that he had no knowledge

²⁴
of its existence. However, it is important to point out that to fall within the rule there must be, among others, a non-natural use of the land. While the unique nature of the ruling cannot be ignored by parties associated with oil and gas ventures on land, it appears most unlikely that the Rylands rule would eventually be extended without change to offshore activities.

Another exception to the general rule that a employer is not liable for the acts of his independent

23. This was also the question which the then Lord Advocate put to the Law Reform Committee for Scotland in 1964. See the Thirteenth Report of the Law Reform Committee for Scotland, Cmnd 2348. The majority recommended that the law should not be changed. Professor T.B. Smith dissented, contending that the law should be clarified by a statutory declaration that the principle enunciated in the rule of Rylands v. Fletcher should not apply in the law of Scotland. For commentary, see 1964 S.L.T. (News) 225.

24. For a complete list of cases, see 28 Halsbury's Laws of England (3rd ed.) 145.

contractor, which is probably of more interest to persons involved in offshore operations, is based upon extra hazardous or inherently dangerous acts. It has been established that where the work which the independent contractor is employed to do is of a character likely to be dangerous to the public, unless done with proper precautions, the employer is responsible to any member of the public who sustains injury in consequence of the manner in which the work is done.²⁵ It is also quite conceivable that when the act or operation is likely to cause injury to others unless special precautions are taken, the degree of care required is proportionately high.²⁶ Courts are thus inclined to the view that the responsibility for the negligence of an independent contractor in such circumstances should be

25. Recognised in decided cases, in particular Daniel v. Rickett Cockerell & Co., Ltd. and Raymond, [1938] 2 K.B. 322; [1938] 2 All E.R. 631; Balfour v. Barty King, Hyder & Sons (Builders), Ltd., [1957] 1 Q.B. 496, C.A.; [1957] 1 All E.R. 156. For Scottish authorities, see Walker, The Law of Delict in Scotland (1966) Vol. 1, pp. 165, 166. Note however Cloggie v. J O'Donoghue (Reinstatements) Ltd., 1981 S.L.T. 10.

26. 28 Halsbury's Laws of England (3rd ed.) 13.

imposed upon his employer.

Regrettably, there is no legal classification of
 work or things as dangerous or not dangerous, although
 it has been decided that operations connected with the
 handling of petroleum and the distribution of gas call
 for special precautions. So far, there has been little,
 if any, judicial authority in the UK on the issue as to
 whether offshore oil activities - or any part of the
 activities - can be termed extra hazardous or inherently
 dangerous. Some decisions in the United States courts,
 nevertheless, have supported the position that oil and

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27. Honeywill and Stein, Ltd. v. Larkin Brothers, Ltd.,
 [1934] 1 K.B. 191, C.A. This case is discussed in
 Williams, "Liability for Independent Contractors,"
 [1956] Cambridge Law Journal 180, at p. 186.
28. 28 Halsbury's Laws of England (3rd ed.) 56.
29. Century Insurance Co., Ltd. v. Northern Ireland Road
 Transport Board, [1942] A.C. 509, H.L.; [1942] 1 All
 E.R. 491.
30. Jackson v. Carshalton Gas Co., (1888) 5 T.L.R. 69;
Dominion Natural Gas Co., Ltd. v. Collins and Perkins,
 [1909] A.C. 640, P.C.

gas operations are not per se dangerous as to apply the
³¹
 absolute liability doctrine.

It is not proposed in this work to deal with the status of sub-contractors. It must however be remembered that the contractor's - or its underwriter's - liability depends partly upon the nomination of sub-contractors. This may be gauged by the fact that the contract between the operator and his contractor usually requires the contractor to be liable for and indemnify and keep indemnified the operator against all losses and claims for damage not only to the contractor himself, but also to the sub-contractors, which may arise out of or in consequence of the performance of the work by the
³²
 contractor. In such a case, if the operator still reserves the right to nominate the sub-contractors - as is sometimes the case - it is submitted that the

31. E.g. Turner v. Big Lake Oil Co., 128 Tex. 155, 96 S.W.2d 221 (1936), as cited in Canuteson, "Insurance and Liability Problems Relating to Drilling and Servicing Operations," (1967) 18th Annual Institute on Oil and Gas Law and Taxation 181, at p. 185.

32. See, for example, the Thistle Field Contracting Agreement (final copy), cl. 14.3.

stipulation should be subject to the rule of unconscionability. According to the terms of the contracts mostly involved, however, it seems plain enough that use of sub-contractors by the contractor will not on the whole relieve the contractor from any liability under the contract.

4. Olsen v. Shell Oil Co.

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Olsen v. Shell Oil Co. involved an accident which occurred in federal waters off the Louisiana coast aboard a fixed platform owned by Shell Oil Co. Drilling was conducted from the platform by an independent drilling contractor known as Movable Offshore Inc. (Movable). To carry on the operations, Movable had located its modular and movable drilling rig on the platform. In addition, Movable had attached its modular living quarters to the platform. Significantly, the modular living unit was fully movable.³⁴ When the drilling rig was moved from one platform to another, it was picked up as a unit by a derrick barge and then

33. 561 F.2d 1178 (1977)

34. Such a structure should however be distinguished from a tender moored alongside a fixed platform. See below, Chapter 4.

transported to a new site. The living quarters unit was attached to a drilling platform in such a way that cutting and burning of metal would be required to remove it. The living quarters unit was equipped with two electric water heaters which were wholly owned, as was the unit, by the independent contractor.

As a result of an explosion of one water heater on May 6, 1970, some workers employed by the independent contractor were either killed or injured. Apart from the workmen's compensation benefits under the Longshoremen's and Harbor Workers' Compensation Act, the present action was brought by the representatives of decedents and the injured workers against Shell Oil Co.

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The plaintiffs set forth two theories of liability. They asserted that Shell had breached certain federal

35. Workmen's compensation benefits under the Longshoremen's Act are the exclusive remedy against the worker's employer. However, the employee's tort action against any third party who might be responsible for his injury remains unaffected. Where an oil company owning a platform employs an independent contractor to conduct drilling operations, the oil company becomes the injured worker's most likely third party defendant.

regulations issued by the Secretary of the Interior pursuant to the statutory authority under the Outer Continental Shelf Lands Act. In rejecting this contention, the court held that the Act does not create a private cause of action in favour of the plaintiffs against the platform owner for breach of the regulations where there was no negligence on the part of the platform owner.³⁶

In the alternative, the plaintiffs argued that Shell was strictly liable to the plaintiffs, regardless of its lack of personal negligence, under the Louisiana Civil Code art. 2322 which provided:

"The owner of a building is answerable for the damage occasioned by its ruin, when this is caused by neglect to repair it, or when it is the result of a vice in its original construction."

It is important to note that the definition of "building" had been extended in Louisiana to include oil platforms.³⁷ Having applied this interpretation to

36. This has been echoed by Bourg v. Texaco Oil Co Inc., 578 F.2d 1117 (1978), in which the court held that such regulations did not create any form of vicarious liability on the part of a platform owner.

37. Vinton Petroleum Co. v. L. Seiss Oil Syndicate, Inc., 19 La. App. 179, 139 So. 543 (1st Cir. 1932).

the case at bar, the court turned to the main issue of contention between the parties, i.e. whether an owner of an offshore drilling platform could be held strictly liable pursuant to art. 2322 for injuries sustained by employees of an independent contractor present on the platform for the purpose of conducting drilling operations.³⁸

The general rule enunciated in the Louisiana Supreme Court's holding in Cole v. Louisian Gas Co.³⁹ was that "the servant of an independent contractor must look to him (and not to the person with whom he has contracted) for injuries which they receive through his fault or negligence." It was also held⁴⁰ in Henson v. Traveler's Ins. Co., that an injury to the employee of an independent contractor caused by the contractor's negligence did not impose strict

38. For a discussion of art. 2322, see Comment, "Article 2322 and the Liability of the Owner of An Immovable," (1967) 42 Tulane Law Review 178.

39. 121 La. 771, 46 So. 301 (1908).

40. 208 So. 2d 366 (La. App. 1968).

liability on the building owner. One exception to the general principles which governed a situation involving an independent contractor appeared to be where "the contract directly requires the performance of a work⁴¹ intrinsically dangerous, however skillfully performed." Noting that there was an absence of clear and controlling precedent directly applicable to the present case, the federal court found it unable to reach a decision as to whether an independent-contractor defence was available to the defendant.

Adding to the difficulty were other grounds upon which Shell based its contentions. Shell argued that it could not be held strictly liable pursuant to art. 2322 because it did not own the modular drilling rig containing the hot water heater, nor did it own the soil upon which the platform was placed. Shell further contended that the water heater was not an immovable by attachment within the meaning of Cothorn⁴² v. La Rocca, because the water heater was not placed

41. Vinton Petroleum Co. v. L. Seiss Oil Syndicate, Inc., 19 La. App. 179, 182; 139 So. 543, 545. supra note 37.

42. 255 La. 673, 232 So. 2d 473 (1970).

on the premises by the owner of the building as
 required by art. 467 of the Louisiana Code.⁴³ It was
 also argued that the accident had not resulted from
 "ruin" within the purview of art. 2322, but rather
 had been caused by the negligence of Movible.

Instead of rendering a judgment on the plaintiffs' second theory of recovery, the federal court chose to certify certain questions to the Louisiana Supreme Court. The questions were:

- "(1) Whether the owner of an offshore drilling platform can be held strictly liable pursuant to Article 2322 of the Louisiana Civil Code absent the existence of intrinsically dangerous work and absent the exercise of control of the premises - when employees of an independent contractor hired by the owner are injured while on the platform by the explosion of a hot water heater located in the living module which caused part of the platform to fall or collapse, and when the employees are on the platform for the purpose of conducting drilling operations and not for the purpose of repairing or constructing the platform or any appurtenances or attachments thereto.
- (2) Assuming that an owner cannot be held strictly liable to employees of an independent contractor without the existence of an intrinsically

43. The court in Cothern recognised that an appurtenance or an immovable by attachment may come within the ambit of "building".

dangerous activity, whether drilling for oil on an offshore drilling platform constitutes "intrinsically dangerous work" within the meaning of Vinton Petroleum Co. v. L. Seiss Oil Syndicate, Inc., 19 La. App. 179, 139 So. 543 (1st Cir. 1932), and as applied to Article 2322 of the Louisiana Civil Code.

- (3) Whether injuries sustained by an employee of an independent contractor are the result of "ruin" of the building within the meaning of Article 2322 of the Louisiana Civil Code, when the fall or collapse of the building is caused by the explosion of a hot water heater attached to the living module of the platform.
- (4) Whether a modular and movable drilling rig which is attached to an offshore drilling platform in such a manner that cutting and burning would be required to remove it, and which is not owned by the owner of the platform to which it is attached, constitutes an "immovable by attachment" within the meaning of Cothurn v. La Rocca, 255 La. 673, 232 So. 2d 473, 477 (1970), and as applied to Article 2322 of the Louisiana Civil Code.
- (5) Whether an owner of an offshore drilling platform can be held strictly liable pursuant to Article 2322 of the Louisiana Civil Code for injury sustained upon the platform, even though ownership of the underlying soil is not vested in the owner of the platform."
(Emphases added)

In response to the above-quoted questions, the Louisiana

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Supreme Court first stated the three requirements for the

44. In Olsen v. Shell Oil Co., 365 So. 2d 1285 (La. 1978).

application of art. 2322: (1) there must be a building; (2) the defendant must be its owner; and (3) there must be a "ruin" caused by a vice in construction or a neglect to repair, which occasions the damage sought to be recovered.

As far as the first requirement was concerned, the Louisiana Supreme Court reiterated, but added little to, the holding in the ⁴⁵Vinton case.

The majority in Olsen easily disposed of question (3) by holding that an explosion did fall within the ⁴⁶definition of "ruin". The Louisiana Supreme Court also concluded that question (4) should be answered affirmatively. In addition, the court cited the 1978 reenactment of Civil Code art. 464 for the proposition that a building may be an immovable separate and distinct from the land on which it was situated when owned separately, thus rejecting Shell's contention reflected by question (5).

45. Supra note 37.

46. Such an approach has been criticised by a writer, see Note, "Olsen v. Shell Oil: Expanded Liability for Offshore Oil Platform Owners," (1979-80) 40 Louisiana Law Review 233, at p. 241.

In addressing question (1), the court took the view that the living unit and its component parts constituted an appurtenance of the building. The unit should be included within the term "building" for purposes of determining the platform owner's delictual responsibility. Accordingly, any ruin of an appurtenance may be considered a ruin of the building. Most significantly of all, the owner of a building had a non-delegable duty to keep his building and its appurtenance free of injury-causing defects. In the court's view, the owner may be exculpated from the strict liability imposed by art. 2322 only if the victim was injured not because of the defect, but because of the fault of the injured person or of some third person. In that context, the "third person" should be a stranger rather than a person like Movable who acted with the consent of the platform owner in the performance of the owner's non-delegable duty.

On these considerations in favour of the plaintiffs, the Louisiana Supreme Court reasoned that it was unnecessary to that extent to answer the question posed by the federal court as to whether offshore drilling

constituted intrinsically dangerous work.

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As one writer has mildly suggested, the decision of Olsen would provide a broader basis of liability for platform owners. This being the case, it is extremely questionable as to whether the approach adopted by the Louisiana Supreme Court could be justifiably maintained.

So far as the decision is concerned, the analogy with "building" may not be completely misplaced. Be that as it may, that a building owner's liability could be extended to the structures not owned nor controlled by him would seem to be a strained analogy, by which one can hardly be persuaded. The argument from "appurtenance" appears to be equally thin. Can it not be successfully argued that the platform constituted an appurtenance of the drilling rig?

Above all, it must be stressed that the theory of independent contractor is based upon sound legal grounds. In bringing rationality to the laws which govern the situations involving independent contractors, the courts should by no means exaggerate or enhance the

47. Supra note 46.

derogations from the established general principles. Have such principles been given great weight in reaching the Olsen decision?

More is now being heard of the view that major parties involved in offshore oil activities should each bear the risk in respect of their own employees, which has been rightly reflected by the majority of offshore drilling contracts.⁴⁸ The courts may be justified in imposing severe strains on platform owners and subjecting them to "enterprise liability"⁴⁹ despite the contractual commitments. This is not necessarily how the liability insurers see the issue. In view of the sophistication of offshore liability coverages, it is only in a situation in which the parties' liabilities are specifically defined that viable liability insurance can be expected.

⁵⁰
As has been previously noted, the duty to obtain liability insurance is usually vested in the operator in a joint venture. It has also become standard

48. E.g. cls. 1003 and 1004 of the I.A.D.C. contract.

49. As used by the Louisiana Supreme Court.

50. See above, p. 67.

practice that a drilling contract is entered into between the drilling contractor and the operator who is ⁵¹ not necessarily the platform owner. In this connection, the holding in Olsen does create a possibility that the platform owner could be subjected to the expanded liability whereas the platform is not owned or solely owned by the operator. Difficulty could thus arise in regard to the implementation of ⁵² the operating agreement. From an insurance standpoint, is it safe to conclude therefrom that the owner of the platform is in a better state to frame the liability insurance?

By the foregoing accounts, it appears to be impossible to come to any other conclusion than that the Louisiana Supreme Court erred in its treatment of the Olsen case.

5. Between drilling and other service contractors

There are in the offshore area a variety of situations

51. In Olsen, Shell was not only the owner of the platform, but also the operator. This is discernible from the fact that the drilling contract was agreed upon between Shell and Movible.

52. See above, pp. 65-67.

involving various contractors with different functions. The possibility of suits by one contractor against another arising from liability or indemnity cannot be excluded. A practical illustration of this aspect may be found in Tri-State Oil Tool Industries, Inc. v. Delta Marine Drilling Company,⁵³ a case which merits fuller scrutiny.

Fontenot was a roughneck and member of a drilling crew employed by Delta Marine Drilling Company. He was seriously injured aboard Delta Marine's submersible drilling rig after being struck by a pipe which fell from an elevator belonging to and furnished by Tri-State Oil Industries, Inc, a service contractor. This accident involving an operation of lifting a wash pipe out of the hole was performed by Delta Marine under the general supervision of Tri-State but under the immediate control of Delta Marine. Fontenot filed a complaint under the Jones Act and the general maritime law against Delta Marine and its insurer, and in maritime tort against Tri-State and its insurer. On the basis of his findings of negligence on the part of

53. 410 F.2d 178 (1969).

Tri-State and of the unseaworthiness of Delta Marine's drilling rig, the District Court judge held both defendants liable, dismissing the cross-claims for indemnity filed by Delta Marine and Tri-State against each other. Both Delta Marine and Tri-State appealed that dismissal only.

Delta Marine contended that it was entitled to indemnity from Tri-State who negligently furnished defective equipment to the drilling rig thus rendering the rig unseaworthy. Tri-State argued, among others, that neither of the cross-claimants was entitled to indemnity from the other because there was no contractual relationship between them. Delta Marine and Tri-State contracted independently with the operator of the oil lease.

The Circuit Court concluded that the right of indemnity existed between parties, one of whom was guilty of active or affirmative negligence, while the other's fault was only technical or passive. That right was equitable and it derived from the legal principle that everyone was responsible for the consequences of his own wrong.

Significantly, cases like Tri-State have shed some

light on the novel and potential exposures to risk which would otherwise be unknown to offshore liability underwriters.

C. Further points to watch

1. The Ryan doctrine

No discussion of the liability in connection with unseaworthiness as has been revealed in Tri-State will⁵⁴ be complete without also referring to the Ryan doctrine which has brought another marked effect on offshore liability insurances. In summary, the Ryan doctrine was enunciated in a decision in which the United States Supreme Court allowed recovery by way of indemnity against the employer of an injured party where the employer had contracted to perform stevedoring operations for a ship owner and the injuries were caused by the unsafe stowage of the ship's cargo. The Supreme Court stated that the Longshoremen's and Harbor Workers' Compensation Act, although it was the exclusive remedy by an employee against his employer in that situation, did not preclude recovery by the ship owner who had

54. Ryan Stevedoring Co. v. Pan Atlantic Steamship Corp., 350 U.S. 124, 76 S. Ct. 232 (1956).

paid a judgment in satisfaction of the claim of the injured employee. And this right of recovery in favour of a ship owner was inherent in the contract undertaken between the parties.

55

In Whisenant v. Brewster-Bartle Offshore Company,
the Ryan rule was tried for the first time in a situation involving an oil rig instead of a conventional ship. This suit arose out of an accident which killed Ray Whisenant, an employee of Loomis Hydraulic Testing Co, Inc. (Loomis), while he was engaged in specialised testing of an oil well drill aboard a submersible drilling barge owned by Brewster-Bartle Offshore Company (Brewster-Bartle). At the time of the accident the drilling rig was drilling an oil well off the coast of Louisiana pursuant to a contract with Texaco Inc. (Texaco). Texaco had contracted with Loomis to perform certain specialised services on the drill pipe. No privity of contract existed between Loomis and Brewster-Bartle. It was found that the unsafe method of procedure devised by Loomis' employee Whisenant was the proximate cause of the accident.

In the aftermath the decedent's widow sued the rig

owner; the rig owner filed a third-party complaint against Loomis, the decedent's employer; and the decedent's compensation insurer intervened for benefits paid. The rig owner settled the cause of action brought against it by the decedent's widow without notifying Loomis or the compensation insurer of the settlement negotiations. And Brewster-Bartle did not submitted the proposed settlement agreement to Loomis for approval. Following that settlement, the District Court decided that since Loomis' breach of its implied warranty of workmanlike service proximately caused the accident and thereby rendered the drilling barge unseaworthy, the barge owner should be indemnified by Loomis pursuant to the Ryan doctrine, the compensation insurer's claim for intervention was denied. Both Loomis and the compensation insurer appealed.

On appeal, Loomis argued that the Ryan doctrine of indemnification should not be extended beyond the traditional stevedore-vessel relationship to a situation in which a specialised service company came aboard a drilling barge and rendered it unseaworthy. Loomis' second contention was that the absence of a contractual relationship between Loomis and Brewster-Bartle should

have been fatal to the owner's Ryan claim of indemnification against Loomis since the warranty of workmanlike performance did not extend to the barge owner when there was no privity of contract between the barge owner and the company performing the services.

The Circuit Court rejected Loomis' first contention, part of its holding reads as follows:

"Given the implied warranty of workmanlike service owed by the special contractor (Loomis) to the drilling barge, we fail to see, on the facts now before us, any reason to treat the scope and measure of recovery for its breach in a manner conceptually different from that applied to the warranty of workmanlike performance owed by the stevedore to the vessel owner in Ryan...In both cases, therefore, we think it appropriate that the party whose fault caused the injury should be held responsible to indemnify the party compelled to pay an injured claimant because of its technical or vicarious liability."

In dealing with the second contention based upon privity of contract, the court reasoned that the basis of the obligation was an implied warranty of workmanlike service and the obligations which arose from the implied warranty were not limited to the confines of the usual action on contract; the zone of responsibility might extend to parties who were not in direct contractual relationship.

Appellant Loomis further contended that the District

Court erred in awarding Brewster-Bartle indemnity for its settlement with the widow of the deceased in the absence of evidence that Brewster-Bartle tendered the proposed settlement to Loomis for approval or negotiation, or offered it the opportunity to defend the action. The Circuit Court accepted this contention and remanded this phase of the case.

Apart from the main cause for remanding the case, it must be admitted that the applicability of the Ryan doctrine to offshore oil and gas activities is a substantial one.

2. Occupiers' liability

Occupiers' liability adds a further important facet to the nature of offshore liability insurances. The fact that people other than oil-field workers may be on board an oil rig, whether or not invited, has necessitated a decision as to whether from a legal viewpoint the occupiers' liability incurred offshore should be treated as that incurred elsewhere.

To a considerable extent, the common law rules governing occupiers' liability has been replaced by the Occupiers' Liability Act 1957.⁵⁶ And the duty which

56. The Act does not apply to Scotland, which is covered by the Occupiers' Liability (Scotland) Act 1960.

"an occupier of premises owes to his visitors in respect of dangers due to the state of the premises or to things done or omitted to be done on them"⁵⁷ is now specifically regulated by the Act.

It is outside the scope of this work to consider in detail the application of the existing law to offshore installations. As far as occupiers' liability is concerned, however, attention should be drawn to section 1(3) of the 1957 Act which provides:

"The rules so enacted in relation to the occupier of premises and his visitors shall also apply, in like manner and to the like extent as the principles applicable at common law to an occupier of premises and his invitees and licensees would apply, to regulate -

- (a) the obligation of a person occupying or having control over any fixed or movable structure, including any vessel vehicle or aircraft,
- (b) the obligations of a person occupying or having control over any premises or structure in respect of damage to property, including the property of persons who are not themselves his visitors." (Emphasis added)

In the absence of any obvious inconsistency with the rules controlling the application of existing law to offshore installations, it appears reasonably clear

57. Occupiers' Liability Act 1957, s. 1.

that offshore facilities should fall within the definition of "premises" or "fixed or movable structures".⁵⁸ And ship-shaped drilling rigs are also covered by the Act.

It is however important to note in this connection that the existing common law rules which determine the person on whom the duty to show care is incumbent, still prevail by virtue of section 1(2) of the Act⁵⁹ and the corresponding Scottish Act.

The employer-independent contractor relationship as has been discussed earlier has a significant bearing on the placing of occupiers' liability. In brief, the rule laid down in Thomson v. Cremin,⁶⁰ in which the House of Lords held that an occupier could not escape

58. Cf. Kitchen, op cit, (supra note 15), at p. 159.

59. Section 1(2) of the Occupiers' Liability (Scotland) Act 1960 provides:

"Nothing in those provisions shall be taken to alter the rules of the common law which determine the person on whom in relation to any premises a duty to show care as aforesaid towards persons entering thereon is incumbent."

Section 1(2) of the English Act makes a similar provision.

60. [1953] 2 All E.R. 1185.

liability for injury to an invitee resulting from the faulty work of an independent contractor, has been changed due to the inception of the 1957 Act. Section 2(4) provides:

"In determining whether the occupier of premises has discharged the common duty of care to a visitor, regard is to be had to all the circumstances, so that (for example) -

(a)...

(b) where damage is caused to a visitor by a danger due to the faulty execution of any work of construction, maintenance or repair by an independent contractor employed by the occupier, the occupier is not to be treated without more as answerable for the damage if in all the circumstances he had acted reasonably in entrusting the work to an independent contractor and had taken such steps (if any) as he reasonably ought in order to satisfy himself that the contractor was competent and that the work had been properly done." (Emphases added)

61

In A.M.F. International, Ltd. v. Magnet Bowling, Ltd., the employer and the independent contractor were both held to be occupiers and were liable under the Occupiers' Liability Act 1957 for failure to take reasonable care in regard to temporary precautions against flooding.

61. [1968] 2 All E.R. 789; [1968] 1 W.L.R. 1028.

In the offshore area, as a matter of fact, it is more likely that there may be more than one occupier at any one time, and that exclusive occupation of an offshore installation can hardly be warranted.

The common duty of care which extended by virtue of the Occupiers' Liability Act 1957, section 1(3) to persons occupying or having control of a structure, is imposed on the sub-contractors if the structure is not in the main contractor's occupation and control but in that of the sub-contractors.⁶² But if the main contractor retains the control of the structure, they owe the common duty of care under the Act to an injured employee of another specialist contractor employed by the main contractor.⁶³

Occupiers' liability may serve as an example of the various statutory liabilities being imposed upon the parties involved in offshore ventures.

D. Offshore liability coverages

1. Some unique features

In the preceding pages, certain distinctive elements

62. On authority of Kenarney v. Eric Waller, Ltd., [1965] 3 All E.R. 352; [1967] 1 Q.B. 29; [1966] 2 W.L.R. 208.

63. Bunker v. Charles Brand & Son Ltd., [1969] 2 All E.R. 59.

underlying the liabilities involved in offshore activities have been peripherally examined. It is apparent that only if parties are aware of the likely effect of those factors, can adequate and feasible coverage be expected.

Before portraying the whole fabric of offshore liability insurances currently available, the writer proposes to outline some particular features which characterise the sophistication of the coverage.

Firstly, offshore operations virtually take place at sea, which presents hazards not previously encountered by those engaged in oil operations on land. As a result, losses are generally multiplied. It is obvious that the introduction of marine perils necessarily affects insurance arrangements. In other words, an offshore liability insurance programme must be implemented on the basis that certain marine perils have been adequately insured against. However, it does not follow that general liability exposures, e.g. third parties liability, are less probable while on board an offshore installation than on land. To this extent, conventional liability coverages are equally important.

Secondly, all the liabilities policies currently in use are not tailor-made. Although substantial and significant strides have been taken towards the achievement of ideal standard forms specially designed for offshore exposures - and actually some forms have been made available - conventional forms based upon old established clauses with amendments and changes being adapted to particular circumstances are still widely used. The application of old clauses with conventional wordings is usually the area where difficulties lie. Whatever the advantage of having standard forms may be, the indications are that in appropriate circumstances conventional clauses are functioning in a fairly effective way. Until a wholly satisfactory answer emerges, it would seem that old clauses tempered by tailor-made provisions are by far most preferable.

Thirdly, there are areas in which overlapping between different liability policies may occur. In addition, the principal methods of obtaining offshore liability coverage are not confined to liability policies. Certain liabilities are covered under combined policies aimed primarily at both liability

exposures and property (physical) damage, which is very likely to cause confusion.

2. Major types of insurance

Offshore drilling contracts almost invariably oblige the drilling contractor to carry certain liability insurances. Although the contracts do not usually require the operator to undertake insurance, both the operator and the drilling contractor - together with all the other contractors and sub-contractors - are virtually principal assureds in any offshore liability insurance plan. In the following sections of this Chapter, an attempt is made to approach the four major liability coverages, i.e. Comprehensive General Liability Insurance, Protection and Indemnity (P & I) Insurance, Construction, Installation, Commissioning and Maintenance (C.I.C.M.) Insurance, and Excess Liability Insurance. In this connection, the corresponding Norwegian P & I policies are also touched upon where relevant.

3. Comprehensive General Liability Insurance

General liabilities to the public form an essential part of any offshore insurance framework. Briefly, a typical Comprehensive General Liability policy under-

takes to indemnify the assured within policy limits the sums which the assured shall become legally liable to pay as damages because of bodily injury or property damage caused by an occurrence. Coverage of this kind is available subject to capacity and, is to be expected, to certain important exclusions.

The standard Comprehensive General Liability policy contains what is termed a "watercraft exclusion" whereby the insurer excludes the liability resulting from the ownership, maintenance, operation, use, loading or unloading of any watercraft. For the drilling contractor who usually owns the drilling rig, this exclusion is detrimental and should be⁶⁴ deleted. From the standpoint of the operator, who normally owns or rents various kinds of supporting vessels, the removal of this exclusion is also necessary. It is however important to point out that

64. This view has the support of many writers. See, e.g. Mead, "Insurance Coverage of Offshore Drilling and Production Operations," (1958) 32 Tulane Law Review 207, at p. 211; Gregg, "Drilling Contracts in the Tidelands," (1958) 32 Tulane Law Review 231, at p. 239; McGillicuddy, "Insurance Coverage in Oil and Gas Operations," (1972) 23rd Annual Institute on Oil and Gas Law and Taxation 111, at p. 130.

this particular coverage is normally afforded under

⁶⁵
P & I policies. Therefore parties may turn to a P & I

insurance as an alternative for that part of the

coverage. A significant point to note here is that

the operator is not eligible for the membership of

⁶⁶
a P & I club, as far as the drilling rig is concerned.

The operator in that case is only a named assured

under the drilling contractor's P & I policy. It is

relevant to remark that the P & I substitution for

this coverage at the drilling contractor's option

⁶⁷
has been endorsed by the I.A.D.C. contract.

⁶⁸
In Grigsby v. Coastal Marine Service, a United States decision in which the watercraft exclusion was the key issue, the insurance carrier disclaimed

65. See below, p. 109.

66. That a P & I insurance is a matter directed to the convenience or protection of the owner has been mentioned in a recent decision: West of Scotland Ship Owners Mutual Protection and Indemnity Association (Luxembourg) v. Aifanourion Shipping S.A., [1980] 2 Lloyd's Rep. 403.

67. See below, p. 110.

68. 412 F.2d 1011 (1969).

its liability. The assured, a supply company, had supplied pumps to be used in discharging water from tanks on a barge, and an employee of the assured undertook to service the pumps. The court found negligence against the assured for violation of the ship repair safety regulations. The insurance carrier contended that if the assured was subject to those regulations, the policy afforded no coverage due to the presence of the watercraft exclusion. The court held that even though the assured company was performing work which federal law might designate as work of a ship repairer, this did not amount to maintenance of a watercraft so as to exclude coverage.

For service contractors or sub-contractors involved in offshore activities, the factual situations like that in Grigsby call for special attention, bearing in mind that courts of other jurisdiction may decide otherwise.

It should be further emphasised that contractual liabilities like those arising from a valid indemnity clause or those delegated to the contractor by virtue of an independent contractor clause, as has been previously discussed, are not covered by the standard

Comprehensive General Liability policy. Contractual⁶⁹ liability coverage is not afforded under P & I policies, either, subject to limited exceptions.⁷⁰ As a corollary, an endorsement to the Comprehensive General Liability policy or a separate contractual liability insurance seems inevitable.

Mention must also be made of Nations v. Morris,⁷¹ another United States decision. Plaintiff was an oil-field worker who sustained bodily injury on a drilling platform 40 miles off the Louisiana shore through the alleged negligence of a fellow employee. Plaintiff sued his fellow employee Morris and the liability insurer of the employer, a drilling company. Under the Omnibus provisions of the general liability policy, the insurer was thereby the liability insurer of Morris. Noting that the Longshoremen's and Harbor

69. Two other major exclusions which are of particular relevance to operations on land, i.e. care, custody, or control exclusion and underground damage exclusion, are noted in Canuteson, "Insurance and Liability Problems Relating to Drilling and Servicing Operations," (1967) 18th Annual Institute on Oil and Gas Law and Taxation 181, at pp. 197, 198.

70. See below, p. 111.

71. 483 F.2d 577 (1973).

Workers' Compensation Act was the whole source of rights and remedies, under which an employee could not recover against his fellow employee, the court rejected recovery. Plaintiff argued that the immunity was personal to that fellow employee and was no defence to the employee's liability insurer. The court reasoned that the Act completely obliterated the rights at common, civil or maritime law against employer and fellow employees. The Act adjusted and re-arranged the rights of maritime and other specifically covered workers. The fellow employee's immunity was a defence "inherent in the nature of the obligation" which could be asserted by the liability insurer. Thus the insurer was held not liable for the fellow employee's negligent acts.

4. P & I Insurance

P & I insurance covers liabilities incurred by the assured, as vessel owner, for the loss of life and personal injury to the people aboard the insured vessel. The principal risks insured against under P & I, in addition to the above, also include damage to docks, piers, buoys and the like, and additional collision liability not covered by the hull insurance.

Although it is possible to obtain in the insurance market the liability coverage normally afforded by P & I Associations (or Clubs), this kind of market outside the Clubs is a comparative rarity.

As far as drilling rigs are concerned, the situation is bound to be different. From the information now available, it is clear that the drilling rigs which are being covered by P & I insurance - even though they are not necessarily ships or vessels in a strict legal sense - are relatively few.⁷² The Clubs provide coverage for those rigs by means of the Clubs' conventional policies designed for conventional ships, with changes and amendments to meet particular requirements. The I.A.D.C. contract does not require the contractor to carry P & I insurance⁷³ on the drilling rig. However, this does

72. Cf. Summerskill, Oil Rigs: Law and Insurance (1979) pp. 208, 209.

73. Appendix B, cl. B of the standard contract provides:
 "Comprehensive General Liability Insurance with the watercraft exclusion deleted covering all operations of Contractor, including, among other risks, the contractual liability herein assumed by Contractor, with a combined single limit of \$10,000,000 for bodily injury and property damage liability in any

not lead to the inference that the contractor is exempted from insuring against P & I risks. In other words, the protection under the Comprehensive General Liability policy as required by the I.A.D.C. contract, with watercraft exclusion deleted or course, covers P & I risks to a considerable extent. If parties maintain both the Comprehensive General Liability policy and the P & I insurance, overlapping can hardly be avoided.

The P & I insurance on drilling rigs usually excludes contractual liabilities. However, if the rig incurs those contractual liabilities under the drilling contract, e.g. liability to indemnify the operator due to an indemnity clause contained therein, and the drilling contract has been submitted to the Club and approved, then the contractual liabilities

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are covered. Contractual liabilities other than those

one occurrence. (Protection and Indemnity Insurance may, at Contractor's option, be substituted for this coverage of marine liabilities.)"

74. Summerskill, op cit (supra note 72) pp. 215, 216.

under the drilling contract, which are usually not normal to drilling activities, are therefore excluded.

Contractual towage liabilities by virtue of the indemnity clause in a towage contract are covered by P & I Clubs in respect of conventional ships. In the case of a drilling rig, these liabilities are explicitly excluded. Nevertheless, it has been indicated that the coverage may still be afforded to certain extent for an appropriate additional

⁷⁵
premium.

As the P & I insurance also undertakes to indemnify the owner of the vessel (or the drilling contractor in the case of an oil rig entered in the Club) for his legal liability for such claims as loss of life, personal

⁷⁶
injury to the crew, it bears much resemblance to an employer's liability policy. Functionally, these two insurances share the same nature in this regard. Therefore, when the crew are under an employer's liability

75. Ibid, at p. 215.

76. Such liabilities are usually excluded by public liability policies. See, e.g. 13 Halsbury's Forms & Precedents (4th ed.) 272, Form 3:C:5.

policy or a similar workmen's compensation scheme,
 this very portion of liability should be excluded from
 the P & I policy at a reduction in insurance cost.⁷⁷

P & I insurance is, without doubt, liability
 insurance. But it differs from Comprehensive General
 Liability insurance in that the former covers only
 liabilities which are expressly specified in the P & I
 policy. An illustrative example may be given of the
 P & I conditions solely for drilling vessels offered
 by two Norwegian Clubs, which may be viewed as a
 remarkable breakthrough in offshore liability insurance.⁷⁸

In early 1970s, significant efforts were made in
 Norway to work out Norwegian-style hull insurance
 conditions for drilling vessels, as opposed to those
 for conventional ships. The so-called General Condi-
 tions for Hull Insurance of Drilling Vessels, based

77. See below, Chapter 4.

78. The following summary is based upon a booklet,
Insurance Conditions for P & I Insurance of Drilling
 Vessels (with commentary) , by Professor Sjur
 Braekhus and Mr. Alex. Rein. The writer of this
 work is indebted to Professor Braekhus for the
 booklet. His advice is also gratefully acknowledged.

upon the Norwegian Marine Insurance Plan 1964, were completed in 1974. Against this background, two Norwegian P & I Clubs, Gard and Skuld, decided to offer an equivalent P & I insurance for drilling vessels in respect of liability coverage. The conditions offered by the Clubs, known as the Terms of Cover, were actually in typical Anglo-American style, with the general P & I conditions of the Clubs being supplementary to the Terms. Having found the Terms not satisfactory mainly because they failed to be complementary to the hull conditions based upon the 1964 Plan, the two Clubs in the summer of 1975 asked Professor dr. juris Sjur Braekhus and Mr. Alex. Rein to prepare a new draft for P & I conditions, together with a commentary in Norwegian and English. The new conditions, which have been adopted by both Clubs, deserve a general analysis.

Under the new conditions, coverage is afforded for the liabilities incurred by the assured for personal injury, property damage, excess of loss through measures to avert or minimise loss under the hull insurance, obstructions and wreck removal, statutory obligations in respect of master and crew, wages

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and effects. According to section of the conditions, however, the coverage is conditional upon the fact that the loss has occurred:

(a) in direct connection with the operation of the drilling vessel entered.

(b) in connection with the activity at one or more supply bases, provided that the activity is in direct connection with the operation of the drilling vessel,

(c) in direct connection with transport between the drilling vessel and a supply base or a port or airport in the vicinity of the base.

Section 3 virtually embodies the fundamental principle that P & I insurance only covers liabilities expressly indicated in the policy, which is in contrast to a Comprehensive General Liability policy where the risks excluded are set out therein. An important point to note is that the "operation of the drilling vessel" referred to in subparagraph (a) includes drilling and all activities in connection therewith.

80

79. See ss. 7-12 of the conditions.

80. Braekhus and Rein, op cit (supra note 78) p. 36.

There is no specific mention of contractual liabilities in the new Norwegian conditions. Therefore it is left somewhat uncertain whether, or to what extent if any, these liabilities are covered. In this connection, reference should be made to the old conditions. Clause III of the old conditions stipulates:

"Notwithstanding anything contained herein to the contrary this policy does not cover any liability:

.....
 5) assumed by the Assured under contracts (or held covered at a premium to be arranged, subject to prior advice to Underwriters) but this exclusion shall not apply to contracts which are normal to offshore drilling operations and which were submitted to the Underwriters hereon during the negotiations for this insurance,

.....
 8) assumed by Contractor under contract or agreement for any property in the Contractor's care, custody or control unless the Contractor would have been liable in the absence of such contract or agreement,
"

In addition to Clause III of the old conditions, consideration should also be taken of another criterion, i.e. whether the terms of the contract may be considered customary in the trade concerned, as stipulated in the 1964 Plan. So far as offshore activities are concerned, nevertheless, it would seem premature to distinguish the developed customs from those being developed. It

is therefore submitted that in the absence of a clear reference to those liabilities the Clubs should be liable to the extent that the contract terms have been submitted to the Clubs and approved, thus corresponding to the general manner in which those Clubs other than Gard and Skuld have been dealing with contractual liabilities.⁸¹

The new Norwegian P & I conditions for drilling vessels are effected on the presumption that the owner of the drilling vessel is the principal assured and a member of the club.⁸² If the entered vessel is not owned or even chartered by the drilling contractor himself, as is sometimes the case, the drilling contractor may still be protected under the owner's P & I insurance by means of a special agreement.⁸³ The same protection applies, subject to exceptions, to the lease operator and the charter, if any.⁸⁴

81. See above, pp. 111, 112.

82. Braekhus and Rein, op cit (supra note 78) p. 36.

83. See s. 19 of the conditions.

84. Ibid.

The entered drilling vessels under the new Norwegian P & I conditions are meant to include different types of drilling rigs other than stationary (fixed) platforms.⁸⁵ Therefore, ship-shaped drilling vessels, semi-submersibles, and even jack-up rigs, are regarded as drilling vessels in this context, notwithstanding the continuing argument as to the legal categorisation of oil rigs.⁸⁶ Although it has been indicated that it is possible to insure fixed platforms on equivalent conditions,⁸⁷ it appears reasonably clear that fixed platforms have been dominated by the C.I.C.M. insurance in terms of liability, as well as property (physical damage), coverage.

5. C.I.C.M. Insurance

Liability insurances needed for offshore activities involving fixed production platforms can be roughly divided into three parts, covering respectively the construction period, the maintenance period, and the production phase. What covers the construction period

85. Braekhus and Rein, op cit (supra note 78) p. 29.

86. See below, Chapter 4.

87. Braekhus and Rein, at p. 29.

is termed builders' risk insurance, which is normally effected by the operator of a joint venture. A special coverage may be afforded by a builders' risk insurance covering also the maintenance period. Once the actual production operations have started, the joint venturers usually carry their liability coverages individually, which may vary considerably.

The builders' risk insurance currently used in the North Sea, particular the British and Norwegian sectors, is best known as the Construction, Installation, Commissioning and Maintenance (C.I.C.M.) insurance. The basic structure of the insurance framework comprises a written policy and a number of standard marine insurance

conditions. A particularly noteworthy feature is that the insurance covers both physical losses and third-

party liability.

88. Builders' risk insurance is of wide application. In the case of constructing a liquefied natural gas (LNG) carrier, for example, this type of insurance is essential. See Swan, Legal Aspects of the Ocean Carriage and Receipt of Liquefied Natural Gas (1977) pp. 95, 96.

89. The writer is indebted to Mr. Michael Howard for a copy of the insurance contract.

90. The physical coverage aspects are discussed in

The Principal Assureds and Other Assureds are specified in Clause 1 of the written policy. All the licensees (co-venturers), the project managers, and the licensees' parent and/or subsidiary and/or affiliated and/or inter-related companies, are under the category of the Principal Assureds.

The Other Assureds, on the face of Clause 1, include contractors and sub-contractors who are contractually related to the licensees in connection with the subject matters of the insurance. As there

Chapter 5. It has been suggested that the costs of such an insurance "package" are cheaper than several individual policies, and that the claim settlements are more expeditious. See Daastøl, "Some Trends in Norwegian North Sea Contracts," in Conference on Contracts and Taxation in the Norwegian North Sea, Bryne, Norway (24, 25 October 1977) pp. 19-32, at p. 28. The idea of framing insurance coverages on a package basis is not a novel one. In the construction industry, the Contractors' All Risks Insurance has been widely used. Such a comprehensive insurance, in which third party liability coverage can also be provided, is normally effected by a contractor on a construction project. A more expanded package, by which employer's liability is also covered, can be effected by obtaining a Contractors' Combined Insurance Policy. The terms and conditions of such a policy are set out in Eaglestone, Insurance for the Construction Industry (1979) pp. 218-225.

is no clear reference to the drilling contractor, it has been suggested - with which the writer of this work is not in agreement - that the drilling contractor is not included.⁹¹ This argument derives mainly from the fact that drilling operations do not usually start until the platform is completed and installed on site. And, as has been pointed out, the present insurance covers the period of construction and may be extended to the maintenance period only, thus seemingly justifying the exclusion of drilling operations for the production hole. However, the problem arises where there are occasions upon which drilling operations, and even actual production, may take place before the completion of the platform. To this extent, whether the drilling contractor is covered before the expiry of the policy is of potential practical importance.

Conceding that in the Period Clause (Clause 3) the inclusion of drilling operations is stated, some writers in favour of the exclusion of the

91. This view is expressed in Rein, Sogn, Krohn, Kaasen and Lund, Norwegian Petroleum Law (1973) p. 6.34.

drilling contractor base their proposition upon, inter alia, the wordings of the Interest Clause (Clause 4) and the Waiver of Subrogation Clause (Clause 9).

In Clause 4, exception (b), it is provided that the property and equipment owned by drilling contractors or other contractors/sub-contractors engaged for drilling/production operations are excluded from the property cover. Nevertheless, the inferences the writers have drawn from exception (b) are of little controlling importance in supporting the exclusion of the drilling contractor from being an Other Assured. It would seem that the writers have failed to observe the remaining part of exception (b), i.e. "...unless separately scheduled hereunder or otherwise declared to Underwriters hereon prior to loss at premium to be agreed." In addition, a consideration of the very nature of an exclusion clause may also suggest that the writers' position is without sound basis. Assuming that the drilling contractor is not meant to be an Other Assured, then is there any point, or ground, for the policy to stipulate specifically that its equipment is

excluded from the property coverage in certain circumstances? Finally, if the equipment has been declared to the Underwriters, as the proviso provides, the drilling contractor's equipment is thereby covered. It would therefore be impossible in that case to resist the conclusion that the drilling contractor is insured under the policy.

The writers have also placed some reliance on the Waiver of Subrogation Clause which provides that subrogation rights "against any of the Assureds also against all Drilling Contractors, Production Contractorswaived." It has therefore been suggested that the fact that drilling and production contractors are named specifically and in addition to the assureds clearly seems to indicate that they are not intended to belong to the class of Other Assureds.⁹² However, this view does not appear to really assist in the determination of the question at issue. As a matter of fact, it is not uncommon to find that the insurer's rights of subrogation against a particular assured are to be waived in such a way by employing similar, if not the same, wordings. This is especially true

92. Ibid.

where an indemnitee is named as an additional assured in a policy and the underwriters' rights of subrogation against the indemnitee are waived.⁹³ On the other hand, it is submitted that the main reason why in the present insurance the drilling and production contractors are so named is probably because of the term of the policy. As has been noted, the policy covers the period of construction and maintenance, drilling which drilling operations have not usually occurred, nor has any cause for the underwriters to be subrogated to the licensees' rights against the drilling and production contractors. The way the present clause is so worded seems reasonably to emphasise that even though the cause for subrogation has occurred as a result of any drilling operations prior to the completion of the platform, the underwriters are still barred from exercising their rights of subrogation. If this interpretation is to be preferred, as has been indicated by other inferences, it would appear enough to refute the proposition that the drilling contractor is not an Other Assured. It is also submitted that

93. See above, Chapter 2, pp. 53-59.

in an accurate sense the present coverage is more of an insurance policy covering a particular period of time during which various risks are likely to emerge, than a policy aimed at certain particular exposures.

The liability coverage under the present written policy is regulated by Clauses 15-17. Clause 15, which contains four sub-clauses, provides a very comprehensive liability coverage. Cross Liabilities Clause (Clause 16) deals with the situation in which one assured incurs liability to any other of the co-assureds, whereas Clause 17 is a Sue and Labour Clause.

Sub-clause (A) contained in Clause 15 refers to a P & I clause, known as S 108,⁹⁴ attached to the present insurance. Clearly this is to ensure that liabilities incurred during waterborne operations are covered. Regrettably, the terms and conditions of the P & I coverage attached are normally used for insurance of conventional vessels. As mentioned⁹⁵ above, the new P & I conditions solely for drilling

94. The letter 'S' is the abbreviation of Sedgwick Forbes, an insurance broking firm.

95. See above, p. 114.

vessels (floating drilling rigs) have been made available. It is not difficult to visualise that in certain respects floating rigs are nearer to offshore fixed platforms than conventional vessels. Even the draftsmen of those P & I conditions for floating rigs are too cautious to apply those conditions to fixed platforms. How much more so should the promoters of the present C.I.C.M. insurance have been in deciding to attach the P & I conditions mainly for conventional vessels to fixed rigs!

Certain unsatisfactory results are thus inevitable. For example, the present P & I clause covers liabilities arising out of loss or damage to personal property and "cargo" on board the insured "ship" (platform). Bearing in mind that production platforms are not used to carry cargo, one can hardly discern the true reason why those terms should be attached to the present insurance without any change. In addition, it gives rise to some doubt as to the coverage of collision liability. It should be noted that collision liability is not dealt with in the written policy itself. This particular liability seems to fall within the Running Down Clause attached to the present insurance, and also within the

present P & I coverage. The present P & I clause expressly covers collision liability to the extent that is not covered by the Running Down Clause thereto attached.⁹⁶ It has been indicated that the present P & I clause covers collision liability of the same kind as is covered by the Running Down Clause but which exceeds the limit specified therein⁹⁷ and therefore it is in this sense an "excess" coverage. This interpretation should be given weight to some extent. Nevertheless, the coverage under the Running Down Clause is conditional upon the fact that the subject matter insured has collided with any other⁹⁸ vessel. An important point to be decided is whether a collision with another fixed platform should be covered. If the Running Down Clause does not cover it by sticking to the word "vessel", it would seem

96. Paragraph 2 of the P & I clause.

97. Swan, Ocean Oil and Gas Drilling and the Law (1979) p. 172.

98. Running Down Clause (Clause 15) of the Institute Clauses for Builders' Risks, as attached to the present policy.

that in this case the liability should be covered by the present P & I clause. Given that presumption, it is obvious that the present P & I clause can no longer be viewed as an "excess" coverage. Confusingly, the present P & I clause only refers to the collision liability incurred in respect of any other ship or ⁹⁹boat. In the light of the foregoing, it appears that the actual effect deriving from this double-barrel protection is not as all-embracing as intended.¹⁰⁰

Sub-clause (B) contained in Clause 15 of the written policy relates to general third-party liabilities, which have been covered in substance by sub-clause (A) to a considerable extent. The liabilities covered under sub-clause (B) are those arising from or occasioned either directly or indirectly by "the Assured's operations in connection with the insured Platform(s)/Structure(s)/Pipeline(s), or parts thereof..." As has been submitted, the

99. Paragraph 2 of the P & I clause.

100. The importance of this issue has been attested to by Polpen Shipping Co. Ltd. v. Commercial Union Assurance Co. Ltd., [1943] K.B. 161.

drilling contractor is included as an Other Assured, the drilling operations within the currency of the present insurance and before the expiry of the construction and maintenance period, should therefore be covered, although others may think differently.¹⁰¹ As sub-clause (B) also covers liabilities arising from loss of life, personal injury or illness, it overlaps sub-clause (A).

Liability for wreck removal is dealt with in sub-clause (D), part of which reads as follows:

"It is hereby agreed to indemnify the Assured hereunder for all costs and/or expenses of or incidental to, the raising, removal or destruction of the wreckage and/or debris (howsoever caused), of the property of the Assured(s) hereon or of others or the provisions and maintenance of lights, marking, audible warnings etc., for such wreckage and/or debris when the incurring of such costs and/or expenses is compulsory by any law, ordinance or regulation or when the Assured hereunder is liable for such costs and/or expenses under Contract or otherwise or when such wreckage and/or debris interferes with the Assured's normal operations."

It should however be pointed out that such liabilities are normally excluded in the case of policies covering the production phase. This can be evidenced by clause 7(i) of the London Standard Platform Form, under which

101. Rein, Sogn, Krohn, Kaasen and Lund, op cit (supra note 91) p. 6.96.

the insurer accepts no liability in respect of -

"Claims in connection with the removal of property, material, debris or obstruction, whether such removal be required by law, ordinance, statute, regulation or otherwise." (Emphasis added)

It should be observed that the exclusion refers not only to the removal of debris, but also to that of property and material. This is of particular practical significance because the oil companies may well be required to remove the production platform when the oil field starts to run dry.

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As drilling contracts normally require drilling contractors to carry certain liability insurances covering particularly the production phase, it is likely that there will be overlapping of the insurances covering the construction and production

102. The United Kingdom Offshore Operators' Association has estimated the cost of removing a typical northern North Sea steel platform at £50 million-£150 million, with concrete platforms costing around £70 million-£90 million. A helpful discussion on problems of removing such redundant installations can be found in Davis, "£10 Billion Bill for Shifting the North Sea's Gigantic Junk," The Sunday Telegraph, March 23, 1980, p. 21.

stages since drilling contractors may have been covered twice as far as the drilling operations within the construction period are concerned. Thus efforts should be made to avoid double insurance and to ensure that the insurances are co-ordinated with each other.

6. Excess Liability Insurance

A final matter which calls for note concerns Excess Liability Insurance. It is generally acknowledged that underwriters' capacity on offshore coverages has improved and is improving. Nevertheless, the satisfactory goal in terms of amounts is yet to be achieved. As offshore insurance markets have lagged behind offshore oil and gas ventures and underwriters are thereby eager to impose limits in their policies, many assureds have been unable to obtain adequate protection. In the event of a catastrophic loss, therefore, the implications are indeed far-reaching.

The aim of Excess Liability Insurance - also known as Umbrella Insurance - is to fill to some degrees the gaps which may not be covered under the insurances maintained by the assureds. The fact that

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103. A fuller description of Excess Liability Insurance can be found in Hope-Ross, "Insurance and Indemnity Problems in Offshore Drilling Operations," (1973) 11 Alberta Law Review 471, at pp. 475, 476.

Excess Liability Insurance is by its nature liability insurance is not meant to indicate that the risks it covers are confined to those normally covered by liability insurances, e.g. Comprehensive General Liability Insurance or P & I Insurance. Rather, Excess Liability Insurance also extends to the area where property coverages like marine hull insurance are exhaustive. With the steady increase in offshore activities, Excess Liability Insurance is also in growing demand.

However extensive Excess Liability Insurance may be, it should be kept in mind that this unique insurance is only a secondary coverage. In other words, in order to effect an Excess Liability Insurance, the pre-condition that there must be a primary insurance should be fulfilled.

It is not uncommon that Excess Liability Insurance may set its own limits and exclusions. From the assured's point of view, he may also prefer to self-insure a portion of the risks by accepting larger deductibles if the cost for a broader coverage is prohibitive.

CHAPTER FOUR

SOME THOUGHTS ON LIMITATION OF LIABILITY
AND EMPLOYER'S LIABILITY INSURANCEIntroduction

It should always be borne in mind that technology exerts major influence and has a considerable effect on offshore oil-related insurance. Difficulties which may befall lawyers and underwriters stem from a number of factors, principal among them which calls for an urgent settlement remains the clarification of the legal status of offshore oil installations. As is shown below, the technological progress is bound to create serious new problems.

Whether offshore drilling or production units should be treated as ships or vessels for some, if not all, purposes has been the cause of much discussion.¹ This

1. See, e.g. Summerskill, Oil Rigs: Law and Insurance (1979) pp. 12-85; Waltham, "Legal Problems Arising from Offshore Operations in the North Sea and Associated Insurances," Proceedings of the Petroleum Law Seminar, Cambridge (8-13 January 1978) vol. 2, pp. 22.2-22.5; Waltham, "Offshore Drilling Units - Legal Problems," The Law Society's Gazette, January

moot point is of vital importance in relation to topics such as collision and salvage. As far as offshore insurance coverages are concerned, legal distinctions made between various oil rigs necessarily have a great bearing on the nature and cost of the insurances. They could be highly material in any consideration of the rights and obligations of the parties concerned. Any potential confusion would inevitably cast a shadow over the workability of the insurances. The purpose of this Chapter is to give coverage in some detail to this vexed problem as it affects limitation of liability and employer's liability insurance involved in offshore activities. These two aspects do not, of course, exhaust the legal and insurance problems associated with the legal classification of oil installations.

A. Limitation of liability

1. The Merchant Shipping Acts and the international conventions

Offshore oil installations can be broadly classified

11, 1978, p. 14; Himsworth, "The Legal Status of Marine Devices Other Than Ships (United Kingdom)", a paper presented to the 10th International Congress of Comparative Law, Budapest (23-28 August 1978).

into mobile units and fixed platforms.² They may also fall into two functional categories: units which are used for exploratory drilling and those concerned with production.

During the exploration phase, appraisal and exploratory wells are drilled virtually from mobile drilling units. Once drilling is completed, a mobile drilling unit moves on to a new site either under its own power or under tow. If the potential quantities to be produced from the field justify commercially the erection of a production platform - usually a fixed structure which can be either concrete or steel³ - the platform is then constructed. When the production process begins, development drilling is⁴ performed from the platform which permits the drilling

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2. In the present context, however, associated structures like pipelines and onshore terminals are not taken into account.
 3. Sometimes drilling starts before the completion of the construction work. See above, Chapter 3, p. 121.
 4. In exceptional cases like Argyll Field and Buchan Field, the production platforms are converted drilling rigs. See Department of Energy, Development of the Oil and Gas Resources of the United Kingdom 1980, Appendix 7, p. 42.

of a number of wells by using the technique of⁵
 directional drilling. During the production period,
 the needs for mobile drilling units are still substan-
 tial,⁶ especially when relief wells are drilled.

The above-mentioned installations are usually
 referred to as offshore oil rigs. In the case of a
 fixed production platform, the complete machinery and
 the structure for development drilling is known as a
 drilling rig. But the term "drilling rig" is also
 commonly used to describe the mobile drilling units
 referred to above.

While novel designs continue to develop at a fast
 pace, the types of mobile drilling units which are by
 far dominating exploratory drilling can be sub-divided
 into four distinct categories: ship-shaped drilling
 vessels, submersibles, semi-submersibles, and jack-up⁷
 rigs.

5. See below, Chapter 5.

6. Further discussed in Chapter 5.

7. For an account of the evolution of designing and
 building offshore oil structures, see Cox, (et al.)
 (eds), North Sea Oil and Gas 1975 (1975) pp. 49-67.

A ship-shaped drilling vessel has been generally
⁸
 accepted as being a ship. It appears reasonably certain
 that the legal basis for treating a fixed platform as
 a ship or vessel is not evident. With drilling units
 like semi-submersibles being widely used, there is room
 for debate as to whether they are ships or vessels. Are
 owners of such floating rigs entitled to limitation of
⁹
 liability? The exploration of this question requires
 an analysis to be made of existing legal regimes at
 both national and international levels.

It is far from clear whether offshore mobile rigs
 like submersibles come within the purview of the
¹⁰
 Merchant Shipping Acts 1854 to 1979 which entitle

8. Summerskill, op cit (supra note 1) p. 67.

9. On which there appears to be no reported decisions.

10. Note however the provisions in Part IV of the
 Merchant Shipping Act 1974, which deal with
 "submersible apparatus". Section 16 of the Act
 provides:

"(1) This Part of this Act applies to any
 submersible or supporting apparatus -

(a) operated within waters which are in the
 United Kingdom or which are adjacent thereto
 and within the seaward limits of territorial
 waters, or

(b) launched or operated from, or comprising, a

shipowners to limit their liability in accordance with the tonnage of their ships. By virtue of the 1854 Act,

ship registered in the United Kingdom or a British ship of a specified description (being a British ship which is not registered in the United Kingdom).

(2) In this section -

"apparatus" includes any vessel, vehicle or hovercraft, any structure, any diving plant or equipment and any other form or equipment,

"specified" means specified in regulations made by the Secretary of State for the purposes of this section,

"submersible apparatus" means any apparatus used, or designed for use, in supporting human life on or under the bed of any waters or elsewhere under the surface of any waters, and

"supporting apparatus" means any apparatus used or designed for use, inconnection with the operation of any submersible apparatus." (Emphasis added)

Section 17 of the Act provides that the Secretary of State may make regulations for, inter alia, the registration of submersible apparatus. The regulations made thereunder are the Merchant Shipping (Registration of Submersible Craft) Regulations 1976, S.I. 1976 No. 940. Such a registration is by no means comparable to the registration of offshore oil installations under the Mineral Workings (Offshore Installations) Act 1971, ss. 2, 7; Offshore Installation (Registration) Regulations 1972, S.I. 1972 No. 702. Further discussed in Chapter 5.

ships include "every description of vessel used in navigation not propelled by oars."¹¹ This definition¹² has been considered in a number of English decisions.¹³ However wide the discretion of courts may be in construing this definition, it is far from easy to deduce from the consideration of these decisions whether a complete definition of "ship" has been arrived at.

11. Section 2 of the Act.

The same definition reappears in section 742 of the Merchant Shipping Act 1894. As far as limitation of liability is concerned, this definition has been extended on several occasions to apply to every description of lighter, barge etc., see Temperley, The Merchant Shipping Acts (7th ed. 1976) para. 682. However, these subsequent enactments do not suffice to show that offshore oil installations are necessarily covered.

12. E.g. European & Australian Royal Mail Co. Ltd. v. Peninsular & Oriental Steam Navigation Co., (1866) L.R. 6 Q.B. 280; The Mac, (1882) 7 P.D. 126 (C.A.); Southport v. Morriss, [1893] 1 Q.B. 359.

13. In this connection, it must also be remembered that "ship" is a concept variously defined in different statutes. See, for example, Part II, Schedule 2 of the Aircraft and Shipping Industries Act 1977, part of which reads as follows:

"5 - (1) In this part of this Schedule "ship" means a floating or submersible vessel with an integral hull and, except in the case of a warship, of over 100 gross tons, but does not include a hovercraft

For example, there is precedent to the effect that a
¹⁴
 pontoon is a ship. Where a pontoon is converted into
 a drilling rig - like the Sea Gem which collapsed and

or a mobile offshore installation,..." (Emphasis added)
 Further, a careful reading of the Industry Act 1972
 suggests that "ship" and "offshore installation" are
 incompatible with each other. Section 10(1) of the Act
 states:

"Subject to the provisions of this section, the
 Secretary of State may, with the consent of the
 Treasury, guarantee the payment by any person who
 is an individual resident in, or a body corporate
 incorporated under the law of any part of, the United
 Kingdom, any of the Channel Islands or the Isle of
 Man of any sum payable by that person in respect of
 principal or interest under arrangements (whether
 by way of loan or otherwise) entered into by that
 person for the purpose of financing the construc-
 tion to the order of that person in the United
 Kingdom of a ship or mobile offshore installation
 of the qualifying size, and its equipment to his
 order." (Emphasis added)

On the other hand, section 10(9) of the Industry Act
 1972 provides:

"In this section 'construction' includes the
 completion of a partially constructed ship or
 installation."

The application of this sub-section has been extended
 by section 2 of the Shipbuilding Act 1979 to include
 the alteration of completed and partially constructed
 ships and mobile offshore installations.

14. Marine Craft v. Blomqvist, [1953] 1 Lloyd's Rep. 514.
 However, a pontoon crane was held not a "ship or
 vessel" within the rules of the P & I Club: Merchants'
Marine Insurance Co Ltd. v. North of England Protection
and Indemnity Association, (1926) 26 Ll. L. Rep. 201.

sank on 27th December 1965 - it is difficult to

conclude with any great accuracy whether a liberal interpretation is justified.

The fact that there is a substantial difference between conventional ships and offshore oil installations in their registration may be of some significance in approaching the present issue. However, it does not necessarily follow that a vessel - once registered under the Merchant Shipping Acts - can no longer be registered as an offshore oil installation under the Mineral Workings (Offshore Installations) Act 1971.

15. See Report of the Inquiry into the Causes of the Accident to the Drilling Rig Sea Gem (1967) Cmnd 3409, pp. 3-6.

16. This is evidenced by the Offshore Installations (Registration) Regulations 1972, S.I. 1972 No. 702. Regulation 5 provides:

"(1) An application for the first registration of an offshore installation shall include the following particulars -
(a) the name and address of the person or persons seeking to register it;
(b) where no address furnished pursuant to head (a) is an address in the United Kingdom, an address in the United Kingdom to which communications for the owner may be sent;

While authorities may not be of much assistance on this facet of the question, reference may be made to the decisions in the United States courts where floating rigs as distinguished from fixed platforms have been held to be vessels.¹⁷

The meaning of a ship or vessel was not given in the International Convention for the Unification of Certain Rules Relating to the Limitation of the Liability of Owners of Seagoing Vessels signed in 1924. Nor was it clearly defined in the International Convention Relating to the Limitation of the Liability

(c) a name or other designation for the installation;

(d) particulars of any other registration of the installation (whether as a vessel or otherwise and whether in the United Kingdom or otherwise);

(e) an indication of the nature and the function or proposed function of the installation;

....." (Emphasis added)

17. Recent decisions include Marine Drilling Co. v. Autin, 363 F.2d 579; Neil v. Diamond M. Drilling Co., 426 F.2d 487; Guilbeau v. Falcon Seaboard Drilling Co., 215 F. Supp. 909; Ferdinandtsen v. Delta Marine Drilling Co., 235 So. 2d 641.

This point is further treated below.

of Owners of Sea-going Ships concluded in 1957. The latter was replaced by the 1976 International Convention on Limitation of Liability for Maritime Claims,¹⁸ which calls for special note. Although the word "ship" was not defined, Article 15.5 of the Convention states:

"This Convention shall not apply to : (a) air-chshion vehicles; (b) floating platforms constructed for the purpose of exploring or exploiting the natural resources of the sea-bed or the subsoil thereof."

At first glance, it would appear that offshore oil rigs are expressly excluded. Nevertheless, it could be argued that jack-up rig, although constructed for such purposes, would not be "floating" when performing its operations. It has been seemingly suggested that a ship-shaped drilling vessel, if constructed for such purposes,¹⁹ should also be excluded. It is doubtful, however, as to whether such drilling vessels which are usually constructed not solely for such purposes could be viewed as "floating platforms".

18. The text of it is in (1977) 16 ILM 616.

19. Summerskill, op cit (supra note 1) p. 38.

2. A proposed solution

Any approach to the question of limitation of liability associated with offshore oil rigs, whereby the stress is laid in the definition of a ship or vessel, might not necessarily provide the best solution to the problem at issue. It is submitted that a qualified application of existing rules governing the limitation of liability of those "conventional" shipowners to rig owners, by simply avoiding the vexed question of the legal classification, may probably prove to be more advisable. In other words, if it is generally thought that rig owners should be entitled to limited liability for whatever reason, it is not necessary that in order to achieve that effect the rigs must

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be classified as ships or vessels. This presumption

20. This is close to, but different from, the approach invoked by the Merchant Shipping Act 1979. Section 41 of the Act provides:

"(1) The Secretary of State may by order provide that a thing designed or adapted for use at sea and described in the order is or is not to be treated as a ship for the purposes of any provision specified in the order of the Merchant Shipping Acts or the Prevention of Oil Pollution Act 1971 or any instrument made by virtue of any of those Acts; and

may be likened to the present factual situation that owners of floating drilling rigs are generally eligible for P & I memberships without being necessarily recognised as "shipowners".²¹

There are, of course, instances where the ideas of limitation of liability and the legal classification of offshore oil rigs are inter-related. To separate these two factors from each other, nevertheless, is

such an order may -

- (a) make different provision in relation to different occasions;
- (b) if it provides that a thing is to be treated as a ship for the purposes of a provision specified in the order, provide that the provision shall have effect in relation to the thing with such modifications as are so specified.

(2) Whether the Secretary of State proposes to make an order in pursuance of the preceding subsection it shall be his duty, before he makes the order, to consult such persons about the proposal as appear to him to represent the persons in the United Kingdom who he considers are likely to be effected by the order."

At the time of writing, no order has been made under section 41 (1).

21. See above, p. 110.

sometimes of considerable significance in terms of offshore insurance conditions. It is evident that rig owners - and probably their underwriters as well - can benefit from the limitation of liability. However, a careful consideration of other parameters would suggest that to place oil rigs under the category of ships or vessels is not necessarily favoured by the underwriters and assureds. This unique point again requires reference to the United States examples whereby certain loopholes have indeed been tightened by classifying floating rigs as vessels. By doing so, however, they have in effect subjected the owners and underwriters to established maritime rules which could expose them to additional claims under the doctrines of seaworthiness, etc. In estimating the potential risks and rating the insurance cost, the underwriters' ability to adjust their coverages would also be confronted with the resulting problem of seaman status, which is described in the later discussion.²²

3. The draft International Convention on Off-shore

Mobile Craft

Leaving aside the question as to whether floating rigs are ships or not, it is recommended that in order

22. See below, p. 158.

to encourage offshore ventures in view of the growing global energy crisis rig owners should be entitled to limited liability.²³ As a matter of fact, efforts of an international nature have been made in the draft International Convention on Off-Shore Mobile Craft²⁴ adopted by the Comité Maritime International in 1977 with a view towards, but not confined to, applying the provisions of the existing international conventions on limitation of liability to offshore floating rigs.

As defined in Article 1 of the draft Convention, "craft" means:

"...any marine structure of whatever nature not permanently fixed into the sea-bed which:

- (a) is capable of moving or being moved whilst floating in or on water, whether or not attached to the sea-bed during operations, and

23. Cf. Dupont, "The Insurance of North Sea Oil and Gas Exploration and Production Operations," Proceedings of the Petroleum Law Seminar, Cambridge (8-13 January 1978) Vol. 2, at p. 21.4.

24. For the text of the draft Convention and the preparatory work on it, see "CMI Conference - Rio de Janeiro 1977. Report of Proceedings," Lloyd's Maritime & Commercial Law Quarterly (February 1978) pp. 14-30.

(b) is used or intended for use in the exploration, processing, transport or storage of the mineral resources of the sea-bed or its subsoil or in ancillary activities."

Article 5, entitled "Limitation of Liability", Provides:

"A State Party which is also a party to

- the International Convention for the unification of certain rules relating to the limitation of liability of owners of sea-going vessels and Protocol of signature dated August 25, 1924, or to
- the International Convention relating to the limitation of liability of owners of sea-going ships and Protocol of signature dated October 10, 1957, or to
- the Convention on limitation of liability for maritime claims dated November 19, 1976,

shall, subject to Article 19 below, apply the rules of any such convention to craft to which they would not otherwise apply. In the case of the 1976 Convention, a State Party shall do so notwithstanding the provisions of Article 15, para. 5 of that Convention."

It seems clear from the provisions that floating submersibles and semi-submersibles have been included. So are jack-up rigs as is evidenced by the wording ".... whether or not attached to the sea-bed during operations." Offshore rigs intended for use in "ancillary activities", as stipulated in Article 1, appear to include those like the semi-submersible multi-purpose service rig ordered

in 1979 by Shellexpro Oil Company owned jointly by Shell and Exxon. The rig was by then the biggest of its type to be built in the world. It would operate in maintenance, rescue and emergency capacity in the East Shetlands basin in the North Sea, and was described²⁵ as representing the world's highest technology. The rig was dynamically positioned. Although it remained stationary by means of an automatic system without anchors, it would still come within the purview of Article 1 of the draft Convention since it was "capable of moving."

It must however be pointed out that the definition of "craft" as used in Article 1 may prove to be inadequate in meeting the challenges from the ever changing technology. Early indications of trouble to come might have been seen in certain novel structures. For example, difficult questions are bound to be raised in the case of the Tethered Buoyant Platform (TBP) system which has been considered as a breakthrough in offshore oil platforms. This system can be installed and maintained without divers. It can also withstand gales and heavy

25. Journal of Commerce, July 26, 1979, p. 2.

seas by allowing the platform to move horizontally at the end of steel tubes or wire tethers anchored to the sea bed.²⁶ It is doubtful whether the platform should be regarded as "permanently fixed into the sea-bed" or not.

What is more open to question is the exclusion of fixed structures. A few years ago, companies had little alternative but to produce oil through permanently-fixed platforms. In January 1980, the US-based Continental Oil (Conoco) group and its North Sea partners announced that they would use the world's first tension leg platform (TLP) to develop the Hutton Field in 1984.²⁷ The TLP is a floating structure, anchored to the sea-bed by vertical mooring lines, and can be easily unhooked and towed away once the field is depleted.²⁸ And the platform can be used again in another field once refurbished.

26. As reported in The Guardian, September 6, 1979, p. 5.

27. Ray Dafter, "North Sea Oil: Revolutionary Concepts Open Up New Vistas," Financial Times, January 22, 1980, p. 14.

28. A similar report with a photo of the new structure can be found in "New Products & Processes," Newsweek, February 4, 1980, p. 3.

Even greater flexibility can be incorporated in a production system labelled SWOPS (Single Well Offshore Production System) currently being developed by British Petroleum. If successful, it would do away with the need for a platform - fixed or otherwise. A drilled well would be fitted with a special type or seabed wellhead structure. Apart from a sonar transmitter and a marker buoy, the remainder of the production facilities would be built into a tanker.²⁹ A flexible riser pipe would be designed to lock on to the the wellhead, with reservoir pressure helping to push the crude oil up the riser and into the tanker.³⁰

By analogy with the rule in the draft Convention, it would appear that both the TLP and SWOPS should be included since they are "not permanently fixed into the sea-bed" as opposed to conventional concrete or steel fixed platforms, notwithstanding the fact that both the novel structures and conventional platforms share the same function - recovering oil reserves. In

29. Dafer, op cit (supra note 27) at p. 14.

30. Ibid.

this connection, it seems also relevant to note that the use of tanker as a means of storage of oil - known as floating storage - is sometimes more feasible than onshore storage.³¹ As the tanker owner is entitled to limitation of liability either under the draft Convention or the previous three Conventions, or both, it is pertinent to inquire whether onshore or fixed storage should be given the equivalent protection.

Further, it is not unusual to see that fishing trawler fleets move into the 500-metre safety zone close to offshore fixed installations ignoring the warnings to leave,³² which is very likely to cause serious risks of damage to the fixed structures. Whatever damage they may cause, the trawler owners are entitled to limit their liability. It should also be kept in mind that

31. See May, "Tankers; Building Contracts, Charters, Operations," Proceedings of the Petroleum Law Seminar, Cambridge (8-13 January 1978) Vol. 2, at p. 27.7.

32. Note the Continental Shelf (Protection of Installations) Order 1981, S.I. 1981 No. 29, made under the Continental Shelf Act 1964, s. 2(1)(3). The Order specifies as safety zones certain areas and prohibits ships from entering such zones without permission.

the trawlers' underwriters can easily disclaim the liability as the violation of statutory rules is normally excluded by the policy. It has therefore been indicated that in working out the insurance programme for the fixed facilities oil companies should take these factors into consideration.³³ In the meantime, however, it is possible that liability may be incurred by the fixed facilities. Unfortunately, the doctrine of limitation of liability is not available to them, for which the legal distinction of fixed and non-fixed structures is to blame.

In the face of the increasingly obvious injustice and the potential controversy as a result of novel technological designs as intimated above, it is recommended that offshore fixed installations should not be treated differently as far as limitation of liability is concerned.

While it is outwith the ambit of this discussion

33. Dakin, "Insurance of Offshore Exploration and Production Risks," Proceedings of the Energy Law Seminar, Cambridge (29 September-4 October 1979) Vol. 1, at p. A2.5.

to delve in detail into the basis upon which the limitation of liability should be effected, it is sufficient that other means than tonnage would appear to be more feasible as applied to offshore oil rigs.³⁴

4. Underwriters' entitlement to limitation of liability

Another important point which calls for consideration concerns an assured's entitlement to limitation of liability as it affects the assured's underwriter.

Assuming that owners of offshore oil rigs are entitled to limited liability, as the writer has been advocating, does it necessarily lead to the conclusion that their underwriters' liabilities are correspondingly limited on equal footings? In other words, can the underwriters on all occasions take the advantage of the assureds' right to limit their liabilities?

It appears that there is little, if any, authority on this point as far as the decisions in British courts are concerned. Nevertheless, it is submitted that this question is more than academic and may offer an approach to the maritime bar in the absence of any clear-cut statutory rules or judicial rulings. This impression

34. Cf. Summerskill, op cit (supra note 1) at p. 38.

may also be strengthened by the implications of Olympic
³⁵
Towing Corporation v. Nebel Towing Company, a United
 States federal court decision.

In Olympic, the limitation of liability was held
 to be a personal defence. The court stated that under
³⁶
 the Louisiana's direct action statute the limitation
 of liability available to a vessel owner was not
 available to the owner's insurer in a direct action
 suit.

The court in Olympic cited a Circuit Court's
³⁷
 holding in Cushing v. Maryland Cas. Co. in supporting
 its position. Surprisingly, the fact that Cushing
 had been reversed by the United States Supreme Court
 failed to change the attitude of the Olympic judges.

The Supreme Court in Cushing pointed out the
 possibility that higher premiums would result if the

35. 419 F.2d 230 (1969).

36. The Louisiana's direct action statute is further
 noted in Chapter 6, see below, p. 307.

37. 198 F2d 536 (1952); 347 U.S. 409 (1954).
 This case is further noted in Chapter 6, see
 below, p. 309.

insurer was held liable beyond the amount of the limitation fund, which would in turn deny the shipowner full benefit of the federal Limitation Act. However, the judges in Olympic were of the opinion that the possibility of higher premiums was an insufficient basis for permitting an insurer to limit its liability, denying that the Limitation Act was intended to limit the amount of premiums paid by vessel owners on insurance. The insurer (appellant) in Olympic ³⁸ contended, among others, that the right to limit liability was not a personal defence under Louisiana law. The court however took the position that the Limitation Act was designed to assist the maritime industry and that it was in no way intended to benefit the insurance industry. As the status of insurer was not covered by the public policy underlying the Limitation Act, the limitation of liability under the federal statute was a personal defence which could not

38. The appellant also contended that the insurance policy involved - a P & I policy - did not permit a direct action. The no-action clause contained in the policy was however held ineffective by the Circuit Court.

be availed of by any insurer under Louisiana law.

This discussion does not propose to make any comment on the question of personal defence or the underlying rationale for the relevant Louisiana legislation involved in the Olympic case. Nevertheless, it is felt that if the judicial conclusion in Olympic were to apply to oil-related insurance, which seems not contested yet, it is bound to create more problems than it solved, if any.

It is necessary to bear in mind that liability insurances are heavily involved in offshore oil activities. Despite a number of problems described throughout this work, a considerable portion of risks are virtually assumed by offshore liability underwriters. If the limitation of liability were not available to the underwriters but personal to the assureds who are substantially in a less vulnerable position, it would be of little practical significance. Furthermore, and perhaps most plausibly, oil-related insurance is very much market-oriented. This is the pivotal factor on which any analysis of the insurance implications of maritime judicial rulings must turn. To respond sensibly to expectations about potentially catastrophic

losses in the future, the underwriters would be left with little alternative but to increase the premiums and to enlarge the extent to which the assureds self-insure their risks. It is the consumers of oil products who would as a result of the chain reaction suffer the most.

B. Problems of employer's liability insurance and workmen's compensation in the US.

1. The seaman status

As the legal clarification made between offshore installations is important in any approach to the problem of limitation of liability, so is the legal status of offshore oil workers to the employer's liability insurance and workmen's compensation.

In common parlance, it might be reasonably presumed that offshore oil-field workers on board an oil rig classified as a ship or vessel must then be treated as seamen, and vice versa. As is demonstrated below, nevertheless, this presumption is far from correct. It is proposed to explore this question by examining some federal legislation and judicial decisions in the United States jurisdiction.

2. Fixed-rig workers

In summary, an offshore oil worker classified as a seaman can proceed against his employer for maintenance and cure under the Jones Act and the unseaworthiness doctrine. A distinctive feature of the Jones Act is that there is no statutory limitation of the amount recoverable. If a seaman is found guilty of contributory negligence, the amount recoverable may be reduced, but this does not constitute a complete bar to his action.

Early cases established that fixed structures were not vessels, which denied typical fix-platform workers seamen's remedies. This conclusion raised the question of the applicability of the Longshoremen's and Harbor Workers' Compensation Act. Nevertheless, there were cases where fixed-platform workers were held to be neither seamen nor under the coverage of the Longshoremen's Act, and accordingly state workmen's compensation became their primary injury remedy.

39. For works examining this area of the law, see Comment, "When Is An Offshore Oilfield Worker A Seaman?" (1967) 27 Louisiana Law Review 757; Robertson, "Injuries to Marine Petroleum Workers: A Plea for Radical Simplification," (1977) 55 Texas Law Review 973.

The Outer Continental Shelf Lands Act 1953 changed the situation, making Longshoremen's ⁿAct benefits available to workers on fixed platforms located beyond three miles from shore, whereas workers on fixed rigs within three miles from shore continued to resort to state workmen's compensation law for their rights for compensation against their employers.⁴⁰

3. Tenders alongside fixed rigs

The general rule that oil workers on fixed platforms were not seamen was - and is now still being - challenged with success in cases involving tenders or auxiliary vessels alongside fixed platforms.

Tenders or auxiliary vessels associated with fixed platforms are usually used for supporting operations. They can also serve as living quarters if the fixed rigs are not self-contained. In a typical platform-tender situation, it is common to find that an employee

40. Generally, greater benefits are available under the Longshoremen's Act than under state workmen's compensation law. Therefore, the argument that a distance of three miles should not deprive stateside oilfield workers, performing identical tasks as their offshore counterparts, of the improved benefits available under the federal act, is not without force.

may live aboard the tender and even perform part of his duties aboard the tender, such as loading supplies and cleaning up. Not surprisingly, he then may well be held to be a member of the crew of the tender. To claim seaman status in that case, it is immaterial whether he is injured on board the tender or on the fixed platform.⁴¹ Nevertheless, the characterisation of the worker's employment on the tender is of vital importance in securing seaman benefits. To this extent, the worker's exact duties on board the tender and the amount of time he spends working on the tender as opposed to working on the fixed rig are generally considered as key factors.⁴²

In view of the foregoing, there is no ground for asserting that workers on board offshore fixed rigs not regarded as ships or vessels must be non-seamen.

4. Floating-rig workers and the Robison test

As previously noted, floating oil rigs have been

41. E.g. Noble Drilling Corp. v. Smith, 412 F.2d 952, cert. denied. 396 U.S. 906 (1969).

42. There has been a great deal of significant litigation in the US federal courts, e.g. Texas Co. v. Savoie, 240 F.2d 674; Keener v. Transworld Drilling Co., 468 F.2d 729; Callahan v. Flour Ocean Servs. Inc., 482 F.2d 1350.

held in the United States to be vessels, although they function only to a minimum extent as a means of transportation. However, this does not lead to the inference that workers on board floating oil rigs are necessarily entitled to attain seaman status.

43

In Texas Co. v. Gianfala, the first case classifying offshore oil workers on board floating rigs as seamen, the decedent was killed while unloading tubing with a hydraulic lift on board a submersible drilling rig. The jury determined that the worker was a seaman and awarded damages under the Jones Act. On appeal, the Fifth Circuit reversed, holding that the decedent was not working in aid of navigation nor was he a member of the crew of the vessel, but was a member of the drilling crew. But the United States Supreme Court reversed on certiorari without discussion.

Among cases subsequent to Gianfala, Offshore Co. v.

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Robison which involved a submersible drilling rig was a leading one in that the legal requirements for an oil-

43. 350 U.S. 879, rehearing denied, 350 U.S. 960 (1956).

44. 266 F. 2d 769.

field worker to be a seaman were established to some degree. As to whether there was a legally sufficient evidentiary basis to submit a Jones Act claim for seaman status to a jury, Judge Wisdom of the Fifth Circuit delineated the definitive test, which is worth quoting in full:

"(1) if there is evidence that the injured workman was assigned permanently to a vessel (including special purpose structures not usually employed as a means of transport by water but designed to float on water) or performed a substantial part of his work on the vessel; and (2) if the capacity in which he was employed or the duties which he performed contributed to the function of the vessel or to the accomplishment of its mission, or to the operation or welfare of the vessel in terms of its maintenance during its movement or during anchorage for its future trips."

The Robison test has been applied in a number of cases involving floating rigs and, significantly, to situations where tenders or auxiliary vessels as described above were present. While the Robison rule is by no means extensive enough in the context of offshore oil operations, one important conclusion which can be drawn thus far would be that workers aboard floating rigs legally classified as vessels are not always able to recover under the Jones Act and maritime law as seamen. In

this connection, it should also be noted that once a worker has been classified as a seaman because of the nature of his employment on a floating rig, the temporary assignment to a fixed platform does not divest him of his status as a seaman.⁴⁵

5. 1972 Amendments to the Longshoremen's Act

The 1972 Amendments to the Longshoremen's Act have substantially expanded the coverage of the Act and in turn affected the status of offshore oil workers.

As far as this discussion is concerned, a few fixed-rig workers continue to achieve seaman status because of their relationship with the tenders or auxiliary vessels used in connection with the fixed rigs. Those fixed-rig workers who are not entitled to seaman benefits and who suffer injury beyond three miles from shore are covered by the Act for compensation purposes. Some of the fixed-rig workers injured within three miles, who were not covered by the Act before 1972 and who had to resort to state workmen's compensation statutes, have now been brought into the

45. Higginbotham v. Mobil Oil Corp., 545 F.2d 422.

coverage of the Act by the 1972 Amendments.

In cases of floating-rig workers, the Robison test is of continuing importance, notwithstanding the 1972 Amendments to the Longshoremen's Act. In brief, those floating-rig workers lacking seaman status because their connection with the floating rigs fails to satisfy the Robison requirements are now covered by the amended Act, irrespective of the three-mile limit.⁴⁷

With these statutory guidelines in mind, one may still find it difficult to ascertain with great certainty

46. The determining factors include the new geographic and employment status limits imposed by the 1972 Amendments. In general, the geographic limit which refers mainly to navigable waters presents no difficulty. Whether work on fixed rigs meets the new employment status criterion depends on the interpretation of the "maritime employment" under the amended Act. There have been Administrative Law Judge decisions suggesting that ordinary oilfield work on fixed rigs is not "maritime employment" in this context. Therefore, it may be concluded that the amended Longshoremen's Act does not cover all fixed-rig injuries occurring within three miles from shore. It should also be added that the decision against coverage have invited criticism. See Robertson, op cit (supra note 39) at pp. 994-996.

47. E.g. St. Julien v. Diamond M. Drilling, 403 F. Supp. 1256.

as to what benefits are actually available to a particular offshore oil worker, in view of the court's wide discretion in construing the worker's connection with the rigs and vessels involved therein. It follows that viable employer's liability insurances, which are essential to offshore oil activities, can hardly be expected under these circumstances. Offshore employers would be in such a dilemma unable to predict or foresee the extent to which they may be liable to their employees whose legal positions are yet to be decided, which could vary from case to case. Thus, employer's liability policies expressly covering the employer's liability under, say, the Longshoremen's Act, would obviously not suffice. And the greatest protection possibly available can only be achieved by means of broad terms employed in the policies referring to all relevant compensation statutes including, of course, the Longshoremen's Act and the Jones Act. Given such a coverage at the expense of higher premiums which might otherwise be reduced, the benefits available to the employees may ironically be found to be no more than what the Longshoremen's Act provides, or even less. Such insurances, workable as they may be, can hardly fit

in with the employers' actual need. Nor can the potential risks be precisely reflected by the rates.

C. Effects of UK legislation on offshore injuries and compensation

1. The evolution and development of the law

So far as offshore employer's liability in respect of personal injuries sustained by their employees is concerned, the legal distinctions among offshore installations are not evident under the existing United Kingdom legislation. This noteworthy feature, which is in contrast to the US jurisdiction, is shown by the following discussion.

Before approaching the workmen's compensation and employer's liability insurance involved in offshore operations, it is necessary to outline briefly the evolution and development of the law in respect thereof.

The year 1897 saw the introduction of the first Workmen's Compensation Act, which was then extended from time to time and was consolidated in 1925. In essence, the Workmen's Compensation Acts were for half a century the chief statutory remedy for a workman who sustained personal injury arising out of and in the course of his employment. Under those Acts,

negligence was irrelevant and the amount of compensation was limited. In other words, the rights given to a workman the Acts were based upon principles entirely different from those controlling a workman's right to sue his employer at common law. As the liability to provide compensation was the personal liability of the employer, the employer in a sense became the insurer of his employees. Nevertheless, he was free to make insurance arrangements covering his liability under the Acts.

The defects of the compensation scheme under the Workmen's Compensation Acts led to a demand for reform. From 5th July, 1948, the system of workmen's compensation was replaced by a scheme of National Insurance, with the inception of the National Insurance (Industrial Injuries) Act 1946, which was also amended thereafter on several occasions. This in turn led to the introduction of the consolidating National Insurance (Industrial Injuries) Act 1965.

Briefly, the compensation scheme under the 1965 Act was essentially one of compulsory insurance. Benefits were paid to injured workmen out of a fund to which the workmen and their employers contributed,

with the State adding sums to the contributions. In general, benefits were not payable in respect of accidents happening while the insured persons were outside Great Britain,⁴⁸ subject however to provisions dealing with, among others, offshore oil-field workers.⁴⁹ Because the benefits were specific in terms of money , the effect of the legal classification of offshore oil workers in this context was far less significant than the US experience had shown.

The present law governing this area is to be found in Chapter IV of Part II of the Social Security Act 1975, as amended by the Social Security Act 1980. Nevertheless, the idea of the national insurance fund continues to be maintained. Three basic benefits, i.e. industrial injury benefit, industrial disablement benefit and industrial death benefit, are provided thereunder.⁵⁰ The benefit rates are subject to increase. As they do not involve the classification issue which

48. Section 5(4) of the 1965 Act.

49. Section 76 of the 1965 Act.

50. Section 50(2) of the 1975 Act.

has been previously observed, there is no need to set out in detail the rating scheme in the present discussion.

51

With a number of modifications, the 1975 Act has been extended to employment in connection with continental shelf operations. Thus,

"Employment in any designated area which is employment in connection with the exploitation of the resources mentioned in section 1(1) (exploitation and exploration of Continental Shelf) of the Continental Shelf Act 1964 or with the exploration of the sea bed and subsoil in any designated area and which, were every such area in Great Britain, would be employed earner's employment under Chapter IV of Part II of the Act of 1975"

has now been added to be treated as employed earner's

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employment for industrial injuries purposes.

2. Employer's liability

The present National Insurance scheme under the 1975 Act does not relieve an employer of his liability

51. For which the power is given to the Secretary of State. See section 132 of the 1975 Act.

52. The ⁵ Social Security (Employed Earners' Employments for Industrial Injuries Purposes) Regulations 1975, S.I. 1975 No. 467, Regulation 2 and Schedule 1, Part 1, para. 7. However, it was not until Clark v. Ocean Contractors Inc., [1981] 1 W.L.R. 59, that the application of some provisions of the Income and Corporation Taxes Act 1970 to offshore employment was settled.

at common law or that under statute law. Among those statutes relating to offshore employees, the Mineral Workings (Offshore Installations) Act 1971 is of vital importance. The Act, largely generated by the Sea Gem

54

accident, is applied to offshore installations for

53. Subject to section 2(1) of the Law Reform (Personal Injuries) Act 1948 and section 3(1) of the Law Reform (Miscellaneous Provisions) Act (Northern Ireland) 1948, which provide that a court when awarding damage shall take into account one-half of the value of certain social security benefits for five years.

It must be added that there have been proposals to simplify and rationalise the sources of compensation in respect of injuries in the course of employment, and injuries through the use of motor vehicles or other road transport. See in particular The Report of the Royal Commission on Civil Liability and Compensation for Personal Injury (The Pearson Report), Cmnd 7054. For appraisal of the recommendations contained in the report, see Allen, (et al.)(eds.) Accident Compensation After Pearson (1979); Kewley, "The Pearson Report: An Appraisal," (1978) 128 New Law Journal 651; Marsh, "The Pearson Report on Civil Liability and Compensation for Death or Personal Injury," (1979) 95 The Law Quarterly Review 513; Fleming, "The Pearson Report: Its Strategy," (1979) 42 Modern Law Review 249.

54. See above, pp. 140, 141.

underwater exploitation or exploration of mineral resources. It is aimed primarily at controlling safety on offshore rigs and establishing standards for the construction of such installations. In so far as personal injuries are concerned, breaches of the Act or of regulations made under the Act are⁵⁵ actionable. Nevertheless, it makes no reference to remedies for such injuries, as the US Longshoremen's Act does.

Also of relevance is the Health and Safety at Work etc. Act 1974, designed to prevent or reduce accidents by laying down safe working conditions. This Act, which has been made applicable to the areas⁵⁶ designated under the Continental Shelf Act 1964, confers

55. Section 11 of the Act.

The regulations made under the Act include the Offshore Installations (Operational Safety, Health and Welfare) Regulations 1976, S.I. 1976 No. 1019; the Offshore Installations (Emergency Procedures) Regulations 1976, S.I. 1976 No. 1542; the Offshore Installations (Life-saving Appliances) Regulations 1977, S.I. 1977 No. 486, as amended by the Offshore Installations (Life-saving Appliances and Fire-fighting Equipment) (Amendment) Regulations 1980, S.I. 1980 No. 322.

56. The Health and Safety at Work etc. Act 1974 (Application outside Great Britain) Order 1977, S.I. 1977 No. 1232, Order 4.

no civil right of action for failure to comply with
⁵⁷
 the general duties imposed upon the employers. Nor does
 it provide remedies for personal injuries suffered by
 the employees.

The broad definition of offshore installations
 referred to in the Mineral Workings (Offshore Insta-
 llations) Act 1971 has been further extended by the
 Petroleum and Submarine Pipe-lines Act 1975 to cover
 other manned installations, both fixed and floating,
⁵⁸
 used in connection with submarine pipe-lines. This
 Act makes provision for regulations to be promulgated
 in relation to safety of workers engaged on pipe-lines
⁵⁹
 works. Similar provisions for civil actionability
⁶⁰
 are contained therein.

It remains to be decided whether oil workers on
 board offshore installations are also entitled to

57. Section 47(1) of the Act. However, breach of a duty
 imposed by health and safety regulations shall, so
 far as it causes damage, be actionable except in so
 far as the regulations provide otherwise. See s. 47(2).

58. Section 44 of the 1975 Act.

59. Section 26.

60. Section 30.

61
 seaman benefits under the present law. As defined in
 the Merchant Shipping Acts, "seaman" includes every
 person employed or engaged in any capacity on board
 62
any ship. As it is left uncertain whether offshore

oil installations are ships for the purposes of the
 Acts, the statutory basis for treating those workers
 as seamen is by no means clear. It should also be
 63
 added that the judicial decisions interpreting the
 above-mentioned definition do not really assist in
 the determination of the question.

61. Seaman benefits are largely regulated in the
 Merchant Shipping Acts.

62. Section 742 of the 1894 Act. The definition has
 been extended to cover apprentices to the sea
 service, see section 49 of the 1906 Act. These
 provisions should be read in conjunction with
 section 67 of the 1970 Act.

63. E.g. Lascars serving on a British ship were held
 to be seamen, Peninsular and Oriental Steam Naviga-
tion Co. v. The King, [1901] 2 K.B. 686; so was a
 steward in charge of a bar on board a ship, Thompson
v. H. & W. Nelson, [1913] 2 K.B. 523.

3. Employers' Liability (Compulsory Insurance) Act 1969

Employer's liability both at common law and under the statute law, which is different from and independent of their legal duty to pay contributions under the present National Insurance scheme, has led to the introduction of the Employers' Liability (Compulsory Insurance) Act 1969.⁶⁴ This Act requires an employer carrying on business in Great Britain to maintain compulsory insurance against liability for bodily injury or disease suffered by his employees arising from and in the course of their employment in Great Britain.⁶⁵ The amount for which the employer is obligated to insure under the Act shall be two million pounds in respect of claims relating to any one or more of his employees arising out of any one occurrence.⁶⁶ On benefits available to an injured worker, the National

64. This Act came into force on January 1, 1972.

65. Section 1(1) of the Act.

66. The Employers' Liability (Compulsory Insurance) General Regulations 1971, S.I. 1971 No. 1117, Regulation 3, as amended by the Employers' Liability (Compulsory Insurance)(Amendment) Regulations 1974, S.I. 1974 No. 208.

Insurance scheme under the 1975 Act and the compulsory insurance by virtue of the 1969 Act are far apart and not mutually contradictory. Therefore, the fact that both insurance schemes are of a compulsory nature and designed for industrial compensation, confusing as it may be, does not invalidate the rights of an injured worker under either scheme in an appropriate case.⁶⁷

Adding to the complexity is the fact that the worker killed or injured may have taken out a first party insurance policy providing for benefits in the event of his death or personal injury.⁶⁸ The insurance benefits to which the worker is entitled must be distinguished from the two sources of compensation referred to above.

Regulations made under the 1969 Act prohibit for the purposes of the Act certain conditions in policies of insurance which would entitle insurers to deny

67. See however supra note 53.

68. First party insurance is personal and voluntary, the three main types of policy being life assurance, permanent health insurance and personal accident insurance.

liability under the policy. Of those conditions

prohibited by the regulations, two are of particular

70

significance.

By virtue of further regulations in 1975, the

69. The Employers' Liability (Compulsory Insurance) General Regulations 1971, S.I. 1971 No. 1117, regulation 2, as amended by S.I. 1974 No. 208.

70. "Any condition in a policy of insurance issued or renewed in accordance with the requirements of the Act after the coming into operation of this Regulation which provides (in whatever terms) that no liability (either generally or in respect of a particular claim) shall arise under the policy, or that any such liability so arising shall cease -

- (a)
- (b) unless the policy holder takes reasonable care to protect his employees against the risk of bodily injury or disease in the course of their employment;
- (c) unless the policy holder complies with the requirements of any enactment for the protection of employees against the risk of bodily injury or disease in the course of their employment; and
- (d)

is hereby prohibited for the purposes of the Act."

Before the passing of the 1969 Act, those conditions - now prohibited by regulation 2 of the Employers' Liability (Compulsory Insurance) General Regulations 1971 - could be found in many employer's liability policies. See, e.g. London Crystal Window Cleaning Co. Ltd. v. National Mutual Indemnity Insurance Co. Ltd., [1952] 2 Lloyd's Rep. 360.

1969 Act has been extended to waters to which the Mineral Workings (Offshore Installations) Act 1971

⁷¹ applies. Those offshore employees and installations, now covered by the 1969 Act, are specified in Regulation 2 of the 1975 Regulations, which provides:

"The Employers' Liability (Compulsory Insurance) Act 1969 (hereinafter in these Regulations referred to as "the 1969 Act") shall apply to employers of relevant employees employed for work on or from relevant installations, or on or from associated structures in the course of operations undertaken on or in connection with relevant installations, subject to such modifications and extensions as are hereafter in these Regulations prescribed."
(Emphases added)

⁷² "Revelant employee" in this context means an employee -

- "(a) who is ordinarily resident in the United Kingdom, or
- (b) who is not ordinarily resident in the United Kingdom but who has been present in the United Kingdom and waters to which the 1971 Act applies outside the United Kingdom other than territorial waters admacent to Northern Ireland in the course of employment there for a continuous period of not less than 7 days."

71. The Offshore Installation (Application of the Employers' Liability (Compulsory Insurance) Act 1969) Regulations 1975, S.I. 1975 No. 1289, Regulation 2.

72. Regulation 1(2).

"Relevant installation" denotes "an offshore installation in waters to which the 1971 Act applies outside the United Kingdom other than territorial waters adjacent to Northern Ireland not being an installation registered as a vessel (whether in the United Kingdom or elsewhere) which is a dredging installation or is in transit to or from a station."⁷³

An "associated structure" is meant to cover any vessel, aircraft or hovercraft which, in relation to an offshore installation, is attendant on the installation or any floating structure used in connection with the installation.⁷⁴ It seems clear that a tender or auxiliary vessel moored alongside a fixed platform, which is important in determining the benefits available to fixed-rig workers in the United States jurisdiction, is under the category of the "associated structure".

It should be observed that "relevant installations" and "associated structures" as used in the 1975 Regulations are defined in a broader sense than "offshore installations" referred to in the Mineral Workings

73. Ibid.

74. Ibid.

75

(Offshore Installations) Act 1971. However, no distinction between fixed and floating installations is made in either context.

76

For the purposes of the Employers' Liability (Compulsory Insurance) Act 1969, an "Associate structure" is not to be treated differently from a "relevant installation" so far as "relevant employees" are concerned. In the absence of any statutory rule or significant judicial decision specifically classifying these "relevant employees" into different groups, e.g. seamen or non-seamen, there is no solid legal ground

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75. Offshore installation is defined in s. 1(3) of the 1971 Act as "any installation which is maintained, or is to be established, for underwater exploitation or exploration to which this Act applies." This definition does not cover aircraft or hovercraft.
76. Nevertheless, for the purposes of registration under the Offshore Installation (Registration) Regulations 1972, S.I. 1972 No. 702, a distinction is drawn between "mobile installations" and "fixed installations". See the definitions specified in r. 2(1).
77. This is certainly not meant to indicate that offshore employees cannot be subdivided into functional categories which match the various divisions of the operations, e.g. diving crew, production staff, catering staff, etc.

for assessing how much different the insurance benefits available under the 1969 Act will be among different injured employees.

4. Insurance coverages and the Sayers case

Regulation 3 of the Employers' Liability (Compulsory Insurance) Exemption Regulations 1971,⁷⁸ which is of particular relevance to offshore employers' liability insurances, stipulates:

"The following employers are hereby exempted from the requirement of the Act to insure and maintain insurance: -

(a)

.....

(x) any employer who is a member of a mutual insurance association of shipowners or of shipowners and others, in respect of any liability to an employee of the kind mentioned in section 1(1) of the Act against which the employer is insured for the time being with that association for an amount not less than that required by the Act and regulations thereunder, being an employer who holds a certificate issued by that association to the effect that he is so insured in relation to that employee;

....."

The enactment of regulation 3(x) is obviously motivated by the realisation that ships - as well as a substantial

78. S.I. 1971 No. 1933.

number of offshore oil rigs - are insured for such
⁷⁹
 risks in P & I Clubs. As long as the P & I coverages
 are not less than what is required in terms of amount,
 therefore, the exemption thereof is practically advisable.

As has been explained, the entitlement of oil-rig
 owners to P & I memberships does not lead to the
 inference that offshore oil rigs so insured are regarded
 as ships or vessels. Nor does it encourage the belief
 that workers on board those rigs are seamen.

It is important to remember that offshore employers
 who are under P & I coverages in respect of their oil
 rigs are not necessarily protected against the employers'
 liability. There are situations where offshore employ-
 ers, being P & I policyholders, opt to insure against
 their employers' liability separately under employers'
 liability insurances other than P & I coverages. This
 portion of risks in that case should then be excluded
 from the P & I policies at reduced premiums. In this
 connection, it is relevant to note that the I.A.D.C.
 contract, requiring the drilling contractor to maintain
 insurance covering persons employed by the contractor or

79. See above, pp. 109, 110.

its sub-contractors, does not specify P & I coverage as the only insurance open to the contractor against such risks. Rather, it provides:

"Any insurance covering personnel in accordance with the governing law of the jurisdiction where the work is performed or in accordance with applicable laws of other countries, covering those persons employed by Contractor or its subcontractors for work to be performed hereunder whose employment may be subject to such laws, during the period such persons are so engaged."

It is evident from the above-quoted contract terms that the insurance the drilling contractor maintains must be in accordance with either (a) the law which governs the jurisdiction where the work is performed, or (b) the applicable laws of other countries "coverings persons employed...whose employment may be subject to such laws ...". These various laws, which may come into play, should be given adequate consideration by the drilling contractor who is under the obligation to carry the insurance.

80. In Appendix B, cl. A.

81. See Summerskill, op cit (supra note 1) at p. 279. Cf. McClendon, "Some Legal Aspects of Offshore Oil Operations in South America," (1959) 1 Inter-American Law Review at p. 181.

The rationale underlying the I.A.D.C. contract as regards "the governing law of the jurisdiction where the work is performed" is clearly based upon the fact that that governing law has a great bearing on the legality or even necessity of an employers' liability insurance programme covering such risks occasion in that jurisdiction, as the UK Employers' Liability (Compulsory Insurance) Act 1969 has demonstrated. Logically, the law governing the employers' liability insurance - be it compulsory or not - must also be parallel in substance to the law regulating the liability which may be incurred by employers within that jurisdiction, thus rendering the insurance viable and feasible. That is probably why the originators of the I.A.D.C. contract used the words "in accordance with the law..." At any rate, the present standard contract, while reflecting the true picture of offshore practices, has virtually confirmed the proposition that the law governing the jurisdiction where the work is performed is of fundamental importance in determining the benefits available to oil workers injured within that jurisdiction, so far as offshore operations are concerned. Conceivably, where the employers' liability

in such a case gives rise to conflict of laws problem, as is frequently the case, it would appear relatively difficult to rule out that governing law as the applicable law. Bearing in mind this presumption, it seems appropriate to consider the decision reached by the Court of Appeal in Sayers v. International Drilling Co. N.V.,⁸² a decision which is perhaps disappointing to some extent.

The plaintiff, an Englishman, entered into a contract with a Dutch subsidiary of an American oil drilling company to work on oil rigs overseas. The standard form of contract, intended to cover employees of different nationalities working outside their own countries, contained no express choice-of-law provision. Clearly purporting to exclude the plaintiff's rights at law in the event of injury by substituting a company "Compensation Program", the contract provided in clause 8:

"As the company is a Netherlands corporation, and as my employment contract hereby applied for will be wholly performable overseas and outside the United Kingdom, the company does not subscribe to or carry workmen's compensation insurance under the laws of the United Kingdom. Accordingly, I realise that I shall not be covered by virtue of my proposed

82. [1971] 1 W.L.R. 1176 (C.A.).

employment with the company by workmen's compensation insurance or benefits under the law of the United Kingdom...I am satisfied with the provisions and benefits of the said Compensation Program."

The contract further stated:

"In consideration of having this Program maintained for me, I hereby agree that, in the event I am accidentally injured or sustain disability of any kind during my employment with the company, I will accept those benefits to which I may be entitled under the Compensation Program as my exclusive remedy in lieu of any other claims, rights, demands, or actions whether at common law or under the statutes of United Kingdom or any other nation, which may accrue to me by virtue of such accidental injury."

While working on an oil rig off the coast of Nigeria, the plaintiff was injured as a result of the alleged negligence of fellow employees. He was then returned to England and payments were made to him under the terms of the Program.

The plaintiff however sued the defendant company, seeking to override the exempting clause by relying on s. 1(3) of the Law Reform (Personal Injuries) Act 1948, under which any term in a contract of employment having the effect of excluding employers' liability for the negligence of persons in common employment would be

rendered void. The Court of Appeal decided that the proper law to be applied was Dutch law which permitted such a clause, and that s. 1(3) of the 1948 Act could not be invoked by the plaintiff.

On the said choice-of-law issue, their Lordships in Sayers concurred generally, though with differing reasons. One ground of criticism is that Nigerian law - the law governing the jurisdiction where the work had been performed - was decided unanimously to have the least substantial connection. While the reasons for ruling out Nigerian law were far from convincing, the emphasis was virtually on the choice between Dutch and English law. Adding to the criticism is the fact that no evidence whatsoever of Nigerian law was given.⁸³ In view of the presumption as described in the preceding paragraphs and rightly reflected by the I.A.D.C. approach, the irrelevancy of Nigerian law in Sayers - a typical situation involving an offshore accident - could hardly be justified. At this point

83. For criticisms of the decision, see Smith, "International Employment Contracts - Contracting Out," (1972) 21 International & Comparative Law Quarterly 164.

it should be observed that a similar issue was raised in a later Scottish case, where a differing ruling was rendered by Lord Kissen.⁸⁴

Apart from the controversial choice-of-law aspect,⁸⁵ it is not difficult to extract from the decision in Sayers support for the view that offshore employers can successfully avoid employer's liability insurance

84. Brodin v. A/R Seijan, 1973 S.L.T. 198.

85. Certain uniform rules concerning the choice of law have now been established within the European Community. Article 4.1 of the Convention on the Law Applicable to Contractual Obligations provides:

"To the extent that the law applicable to the contract has not been chosen in accordance with Article 3, the contract shall be governed by the law of the country which it is most closely connected. Nevertheless, a severable part of the contract which has a closer connection with another country may by way of exception be governed by the law of that other country."

The rules of this Convention do not apply to contracts of insurance which covers risks situated in the territories of the Member States of the Community. (Article 1.3)

The text of the Convention is to be found in 19 ILM 1492 (1980).

in a case like Sayers, thus resulting in the effect of the law requiring compulsory liability insurance, if any, being literally vitiated. As a matter of fact, even if an employer is within the reach of the law respecting such insurances, he may still opt to ignore the law. Because the employer may prefer following the example of the "Compensation Program" in Sayers to abiding by the compulsory-insurance law, so long as the punishment for infringement thereof is not prohibitive, as the 1969 Act has shown.⁸⁶

5. Insurance policy considerations

As has been pointed out, offshore employers may insure against their employers' liability under P & I policies. And by virtue of regulation 3(x) of the Employers' Liability (Compulsory Insurance) Exemption Regulations 1971,⁸⁷ those employers are legally exempted

86. If on any day an employer is not insured in accordance with the 1969 Act the licensees and owners of the installation are both guilty of an offence punishable by a fine of up to £200. See the Offshore Installations (Application of the Employers' (Compulsory Insurance Act 1969) Regulations 1975, S.I. 1975 No. 1289, regulation 6.

87. Supra note 78.

to that extent from the compulsory-insurance requirements, thus avoiding double insurance. Nevertheless, it is necessary to bear in mind that in practice the operator and the drilling contractor in an offshore venture is each to maintain employer's liability insurance separately and respectively, if any, covering their own employees, which may be evidenced by the I.A.D.C. contract under which the drilling contractor is only obligated to carry insurance for its own personnel as far as employer's liability is concerned. Since operators are normally not entitled to P & I memberships, as previously noted,⁸⁸ regulation 3(x) is only applicable in substance to drilling contractors in the context of offshore operations. However, were all the oil workers involved in an offshore project directly employed by the operator, as demanded by 2,000 Norwegian offshore workers involved in an industrial action in 1980 - a demand which was then turned⁸⁹ down by the National Arbitration Board, it is not

88. See above, p. 106.

89. Financial Times, October 10, 1980, p. 2.

immediately clear whether the operator in that case may obtain P & I coverage for such risks. The answer to this hypothetical question would seem to be negative.

I seeking the employer's liability insurance, two options are open to an offshore drilling contractor whose drilling unit is insured with a P & I Club providing such coverages. He may solely rely upon the protection under the P & I policy; or turn to a separate employer's liability policy, with that portion of risks being excluded by agreement from the P & I coverage. To this complexity, however, has been added the fact that there are situations where employer's liability coverages may be automatically excluded from P & I policies, as described in the following section of the Chapter.

D. The Norwegian conditions and the C.I.C.M. cover

1. Problems of the exclusion

In contrast to the cover afforded by the P & I Clubs generally, two Norwegian Clubs have offered P & I conditions specially designed for mobile drilling
90
units. As far as offshore employers' liability is

90. See above, p. 114.

concerned, the distinction between the P & I Clubs generally and the two Norwegian Clubs is of central importance in that the former normally provide cover for such risks whereas the latter have adopted a different approach.

Under the old conditions - generally known as the
⁹¹
 Terms of Cover - offered by the two Norwegian Clubs, liability "for any claim arising directly or indirectly under Workmen' Compensation or Employers' Liability Acts and any such Statutory Law in respect of accidents to
⁹²
 or illness of any employee of the Assured" was excluded.

Section 13 of the present conditions, as opposed to the old conditions, provides:

"The Association shall not cover:

(a).....

(b) loss which is covered under the Norwegian Folketrygd or which is or should have been covered under equivalent obligatory insurance system in a country to which the operation of the entered drilling vessel has a natural connection,

....."

In brief, the Norwegian Folketrygd referred to in

91. See above, p. 114.

92. Cl. 3(1) of the Terms of Cover.

section 13 is virtually a social security insurance scheme, under which persons residing in the Kingdom and Norwegian subjects employed on Norwegian ships⁹³ are automatically insured. Foreign subjects serving on Norwegian ships are also covered with respect to compensation for death and grants in case of injury suffered in the service. While it is not proposed to discuss in detail the Norwegian scheme, the "equivalent obligatory insurance system in a country to which the operation of the entered drilling vessel has a natural connection" merits some analysis. In this context,⁹⁴ the following foreign countries are meant to be covered:

- (a) the country where the drilling vessel is registered, or the "home country" if it is not registered; and
- (b) the countries on the territory or continental shelf of which the drilling vessel is operating.

There is some doubt as to whether in this context

93. Braekhus and Rein, Insurance Conditions for P & I Insurance of Drilling Vessels (1976) p. 72.

94. Ibid, at p. 73.

"obligatory insurance system" of those relevant countries refers to social security scheme or compulsory employers' liability insurances, or both. Since these two notions do not share the same nature, a clarification would seem to be needed. Nevertheless, as exclusions contained in the present conditions are aimed primarily at the avoidance of double insurance, it may be presumed that exclusion (b) of section 13 purports to cover those areas where the assured's liability towards its employees has been actually covered by means of other obligatory insurances. Accordingly, when the drilling rig while operating in the British sector of the North Sea is also subject to the UK Employers' Liability (Compulsory Insurance) Act 1969, as extended by the Offshore Installation (Application of the Employers' Liability (Compulsory Insurance) Act 1969) Regulations 1975, such risks may not be automatically excluded from the present Norwegian P & I conditions. Since the entered drilling unit has been covered under a P & I policy, it is thus exempted from the compulsory insurance by virtue of regulation 3(x) of the Employers' Liability (Compulsory Insurance) Exemption Regulations 1971.⁹⁵ In

95. See above, 181.

such a unique situation, the present Norwegian P & I coverage cannot exclude such risks which should have been, but actually not, covered in accordance with the UK 1969 Act.

2. C.I.C.M. observations

It is manifest from the foregoing account that P & I conditions, whether those offered by the two Norwegian Clubs or otherwise, are of major importance in assessing employer's liability coverages relating to floating rigs. In considering the corresponding coverages as regards fixed platforms during the construction and maintenance period, one might naturally turn one's attention to the P & I clause contained in the C.I.C.M. insurance.⁹⁶ Nevertheless, a careful distinction must be drawn at the outset between the P & I clause referred to above and a P & I insurance. It should be stressed that this clause, as used in the C.I.C.M. insurance, is by means a P & I policy. Rather, it is intended to cover P & I risks where appropriate within the framework of the C.I.C.M. coverage.

96. See above, p. 125.

If observed in isolation, it appears that no adequate description of employer's liability coverage is specifically contained in the P & I clause under consideration. In fact, an inquiry as to whether the present clause extends to employer's liability would seem to be of little practical significance, since such risks have in the main been expressly excluded from the C.I.C.M. insurance. This exclusion, as incorporated into cl. 15 of the written policy, provides:

"Excluding Workmen's Compensation Acts and Employers' Liability but including liabilities resulting from legal recourses in respect of the rights of subrogation legally permitted under Workmen's Compensation Acts or other common law liability but the foregoing shall not be deemed as being substituted to Employers' legal or statutory obligations as to Workmen's Compensation Acts or Employers' Liability Acts to their own personnel."

The thought behind this exclusion seems partially attributable to the fact that in practice offshore employers usually maintain their employer's liability insurances or compensation schemes separately.⁹⁷ It is thus practically essential that such coverages be obliterated from the present C.I.C.M. insurance which

97. Cf. p. 190.

is designed to cover a number of potential assureds jointly.

However, it is worth bearing in mind that by virtue of the proviso contained in the exclusion the present insurance does not excluded subrogated claims by the compensation insurer of other parties against an assured of the C.I.C.M. coverage. For example, where party A's employee has suffered injury in the course of his employment, for which party B, a named assured of the C.I.C.M. insurance, was wholly or partly responsible; party A's compensation insurer, after settling the claim, could turn to party B for recovery, as long as it is not prohibited by law. To that extent, party B is covered under the C.I.C.M. insurance.

While the present C.I.C.M. insurance covers a fixed rig in the Norwegian sector, the reference to Workmen's Compensation Acts and Employers' Liability should be replaced by the "Folketrygdloven", the equivalent Norwegian Welfare Insurance legislation, under which an insurer has a right of subrogation in
 98
 certain cases. Presumably, these are the situations

98. Rein, Sogn, Krohn, Kaasen, Lund, Norwegian Petroleum Law (1978) p. 3-113, note 34.

to which the proviso is meant to apply.

E. Employer's liability coverage on a global basis

It should be further noted that many oil-associated companies carry on world-wide activities, which require additional consideration in framing their insurance programmes. Against this background, it may be realistic in appropriate cases to form their employers' liability coverages on a global basis. Such coverages vary so from case to case that few generalisations can be made about their structures, which depend mainly upon the intention of the employers and the professional ability of the insurance brokers. As is shown below, underwriters' liability could as a result become unpredictable by its nature in terms of amounts. And novel questions of law have also been created by this very observable phenomenon, of which a recent English decision is a graphic illustration.

99

In Castanho v. Brown & Root (U.K.) Ltd. and another, the controversy before the court was factually complex. On February 11, 1977, an American supply vessel engaged in carrying supplies to oil rigs in the North Sea was

99. [1980] 1 W.L.R. 833.

lying at Great Yarmouth in Norfolk. The plaintiff, a Portuguese subject, was one of the crew of the vessel. While transferring oil from a drum to a tank on board the vessel, the plaintiff sustained a serious accident which left him a quadriplegic.

The injured worker was employed by the second defendant, a Panamanian company. Brown and Root (U.K.) Ltd., an English company providing shore services for the vessel,¹⁰⁰ was the first defendant. Significantly, both Brown and Root (U.K.) Ltd. and the Panamanian company were associates of a vast complex based in Texas known as Jackson Marine Inc. All the corporations comprised in the Texas-based group were insured with the same insurers. Clyde & Co. of London, the solicitors of Brown and Root (U.K.) Ltd., acted in England for those insurers who had a clear interest in the accident.

In September 1977, a writ was issued in England

100. A helpful survey of offshore supply vessels can be found in "Special Reports: Servicing and Supply in the North Sea," Noroil Vol. 2, No. 3 (March 1974) pp. 27, 28.

rather than in Texas where substantially higher damages
¹⁰¹
 could be obtained. By amendment of the writ, the
 plaintiff also claimed against Jackson Marine damages
 for injuries suffered and losses as a result of the
 accident arising out of the negligence and/or breach
 of statutory duty of the defendants, their servants
 or agents. From the insurers' point of view, no
 better policy could be pursued than to encourage the
 issue of the proceedings in England and to confine
 the proceedings there.

On March 22, 1978, a consent order was made under
¹⁰²
 R.S.C., Ord. 29, r. 9 for an interim payment of £7,250
 to the plaintiff and a further order for an interim
 payment of £20,000 was made in December 1978.

-
101. In the United States the scale of damages for
 injuries of the magnitude sustained by the plaintiff
 is something in the region of ten times what is
 regarded as appropriate by the conventional standards
 of the courts of England. Per Shaw L.J., at p. 859.
102. "... 'interim payment,' in relation to a defendant,
 means a payment on account of any damages in respect
 of personal injuries to the plaintiff..."

During 1978 a firm of Texan attorneys contacted the plaintiff, persuading him to bring proceedings in Texas. In February 1979, the plaintiff executed a power of attorney, conferring on the Texan firm exclusive rights to represent him judicially in the United States. In return, the plaintiff agreed to pay them one-third of the sum recovered in an out of court settlement and 40 per cent. if the petition were filed in the court.

Proceedings on the plaintiff's behalf were then commenced in a Texas State court. In May 1979, the plaintiff's English solicitors served notice to dis-
¹⁰³
 continue the English proceedings under R.S.C., Ord.
¹⁰⁴
 21, r. 2(1). In July 1979 the Texan lawyers filed a notice of non-suit in their action and started a

103. The Texan attorneys promised to pay the English solicitors proper costs for the work they had done.

104. "The plaintiff in an action begun by writ may, without the leave of the court, discontinue the action... as against any or all of the defendants at any time not later than 14 days after service of the defence on him..."

fresh action in the United States District Court for
 105 Texas, claiming compensatory and punitive damages. 106

Parker J. struck out the notice of discontinuance as being an abuse of the process of the court. The judge also granted an injunction to restrain the plaintiff from proceeding further with his action in the United States. The plaintiff appealed. Shaw and Brandon L.JJ. concurred in allowing the appeal, with Lord Denning M.R. dissenting.

In a superficial sense, the primary issue was directed at the validity of the notice of discontinuance

105. The reason for starting afresh in the federal court was stated to be that the Texan attorneys considered such courts were more liberal in accepting jurisdiction over foreigners and that an earlier hearing date was likely.

106. The Texan attorneys claimed \$5 million compensatory damages and \$10 million punitive damages and requested trial by jury.

In the United States jurisdiction, plaintiffs and/or their attorneys usually sue for punitive damages in addition to compensatory damages if they consider that they can establish a high degree of negligence on the part of the defendants. This point is considered in Payne, "The USA Jurisdiction Problems As It Affects Liability Underwriting in the UK," (1977-78) 66 Journal of the Insurance Institute of London 24, at p. 27.

under English law. It may however be possible to extract from the judgments rendered by their Lordships support for the view that the debate was virtually dominated by moral or ethical considerations - though with differing interpretations.

It is indeed difficult to disagree with the proposition made by Lord Denning that the present case was a good example of the evils to which champerty could give rise.¹⁰⁷ There is also some force in his argument that the conduct of the Texan attorneys was champertous. Nevertheless, that reasoning seems to have been regarded as tenuous by Lord Justice Shaw.

Admitting that champerty had ugly connotations in English law, Shaw L.J. pointed out that the emotive use of the expression did not "confer upon an English court a universal moral supervision of legal institutions in other countries."¹⁰⁸ To that extent, another passage contained in his judgment

107. At p. 857.

108. Per Shaw L.J., at pl 866.

deserves to be read in full:

"Whatever moral or ethical considerations may inspire (or cloud) the judgment of an English court, it must not seek to meddle officiously with the jurisdiction of foreign tribunals in regard to matters which they consider to be within the province of that jurisdiction."

It is fairly clear that greater stress was laid in Lord Justice Shaw's holding on the suffering of the plaintiff. His Lordship took the view that to deny to the plaintiff the opportunity to pursue his claim for compensation where it would evoke the most generous response was "less than humane."¹¹⁰ Has this also assumed a moral or ethical significance?

Brandon L.J. resolved the dilemma by holding that the great advantage to the plaintiff in suing in Texas where much higher damages were obtainable outweighed other considerations.¹¹¹

No adequate description of the insurance coverage

109. At p. 865.

110. Per Shaw L.J., at p. 358.

111. At pp. 872, 873.

was specifically contained in the judgments. It would seem probable that both Lord Denning and Brandon L.J. found little merit in the insurers' contention that inconvenience and potentially extra expenses could be incurred. Be that as it may, it does not however justify making no mention of the point.

Noting that the insurance factor was dispositive of the issue, Shaw L.J. rightly stated that American corporations, like their insurers, were aware of the scale of damages in the United States, and they arranged their policies and the premiums accordingly.¹¹²

The holding in Castanho has raised several questions with regard to the liability of insurers. Conceivably, the broad effect of the decision has been that the underwriters' liability in monetary terms may differ substantially from jurisdiction to jurisdiction as the claimants are allowed to lodge their complaints therein. At any rate, the underwriters in those situations are the parties that actually bear the risk. Therefore, what is material in approaching

112. At p. 866.

such cases should include the insurance factor. The underwriters' capacity on the risk should in no event be disqualified as a basis for determining the damages. Such a conclusion would be consistent with the position already adopted by the writer in discussing the insurance problems associated with indemnity provisions.

CHAPTER FIVE

OFFSHORE PROPERTY COVERAGES - SOME PROBLEMS

A. The nature and coverages of the insurance1. The nature of the insurance

Apart from liability insurance aspects, offshore oil and gas operations cannot afford to be without property damage insurance covering potential physical losses. As the facilities and equipment involved therein are too many and varied to be dealt with comprehensively, the scope of this Chapter is limited to certain selected major items. In the present context, pipe-lines and other ancillary facilities can only be briefly mentioned but not further analysed.

It is unquestionable that physical damage and liability exposures are by no means comparable in their nature. However, in order to be complementary to the preceding Chapters in which fixed and non-fixed offshore units are in most cases considered separately, the present discussion attempts to pinpoint offshore property coverages on a roughly similar basis where appropriate for purposes of contrast. As may be

ascertained in the following observations, nevertheless, the placing of the demarcation line between fixed and non-fixed oil rigs is of less importance to offshore property insurers than to liability underwriters in so far as indemnification is concerned. Be that as it may, it must be added that the distinction between - as well as classification of - offshore installations cannot be discounted as a factor in determining the types of policies to be used and the rating of premium.

2. Hazards

It has been generally acknowledged that the risk of collapse at varying stages is one of the main hazards of offshore units, of which the loss of Sea Gem¹ has given some indication. The Alexander Kielland² disaster in 1980, in which 123 oil workers were killed, can no

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1. For an official report on the Sea Gem accident, see Report of the Inquiry into the Accident to the Drilling Rig Sea Gem (1967) Cmnd 3409.
 2. The Alexander Kielland was a semi-submersible oil rig accomodating offshore oilmen working on the Edda Field platform, which forms part of the Ekofisk production complex in the Norwegian sector of the North Sea. The disaster occurred on March 27, 1980 when one of the rig's five legs collapsed. The 10,108-ton rig

doubt be viewed as another tragic example which preceded
³
 the recent Bohai Gulf accident off the Mainland China's
 east coast.

⁴
 The losses resulting from blowout, explosion, fire,

overturned within minutes, trapping many of the oilmen. In terms of fatalities, the accident is by far the worst in the North Sea. As to the physical damage aspects, the total insured value of the hull of the rig was \$51.25 million. A significant part of the risk was insured in the Norwegian market, whereas Lloyd's of London and London insurance companies were also involved through the acceptance of 62.5 per cent. of the risk in reinsurance.

The final report by a three-man commission of inquiry into the disaster has been published in early April, 1981.

3. The accident, which claimed 70 lives, involved a jack-up drilling rig which collapsed while operating in the shallow gulf north of the Shandong peninsula. See The Times, July 8, 1980, p. 1; International Herald Tribune, July 8, 1980, p. 4.
4. Fire protection systems for offshore oil installations are examined in "Fighting Oil Offshore," Insurance Vol. 2, No. 3 (March 1975) p. 34. Such systems have been brought under statutory control. See the Offshore Installations (Fire-fighting Equipment) Regulations 1978, S.I. 1978 No. 611, as amended by the Offshore Installations (Life-saving Appliances and Fire-fighting Equipment)(Amendment) Regulations 1980, S.I. 1980 No. 322. For a general guidance in relation to

etc. have been typified by the stricken Bravo platform⁵
 and further illustrated by the Ixtoc I blowout in 1979⁶
 where the drilling rig was blown to pieces. On the
 other hand, the damage caused by Hurricane Allen in
 August 1980 merely highlights the threat of hurricanes
 and windstorms to offshore activities, which is also a⁷

the provisions of the Offshore Installations (Fire-fighting Equipment) Regulations 1978, see Department of Energy, Offshore Installations: Guidance on Fire Fighting Equipment (H.M.S.O.1980).

5. Ekofisk Bravo 2/4-B-14 production well blew out on April 22, 1977, causing the first major oil spill in the North Sea. The Bravo platform sustained considerable physical damage. Discussed more fully by Fleischer, "The Lessons of the Ekofisk Bravo Blow-out," in Cusine and Grant (eds.), The Impact of Marine Pollution (1980) pp. 135-154.
6. The blowout at Ixtoc I exploration well in the Bay of Campeche in early June, 1979, has become one of the world's largest oil slicks. Controlling the oil spill posed serious problems for Pemex, the Mexican State-owned oil corporation.
7. At least one person was killed and 12 were missing in the crash of a helicopter which had been removing oil workers from offshore rigs in the Gulf of Mexico. See International Herald Tribune, August 8, 1980, p.3. And a previous hurricane designated Henry blew down

8

very substantial one.

Among different types of offshore units, ship-shaped drilling vessels are generally considered more stable and a better risk, thus justifying comparatively low rating.⁹ And the trend has been such that underwriters

into the Gulf of Mexico in September 1979, causing Pemex temporarily to abandon efforts to control the Ixtoc I oil spill, as reported in Financial Times, September 19, 1979, p. 4. One recent event in the Northe Sea involved the storm-hit SEDCO 703 drilling rig. For a detailed report, see The Scotsman, February 6, 1981, p. 1.

8. Other celebrated examples of offshore accidents include the Adma Enterprise (a large four-legged jack-up rig), Endeavour (a three-legged self-elevating rig), Ocean Prince (a large semi-submersible), Constellation (a jack-up rig), Cia Barca (a jack-up workover barge), Bluewater I (a semi-submersible), Hubinsel (a small jack-up barge), Mr Cap (a three-legged jack-up rig). For a comprehensive account, see Cooper and Gaskell, The Adventure of North Sea Oil (1976) pp. 127-135.
9. Norris-Jones, "The Problems of Insuring the Oil Industry," (1968-69) 57 Journal of the Insurance Institute of London 84, at p. 85.

tend to assess the risk on the basis of an oil rig's mobility in view of the increasing hazards of offshore towing.¹⁰ It is easy to understand that the insurance rates are also based upon the stability of the installations.¹¹

10. Ibid.

For the sake of completeness it should be mentioned that the present UK certification scheme does not cover the safety of a fixed installation during transit from building site to permanent location as it is not then considered to be an established installation. See Department of Energy, Guidance on the Design and Construction of Offshore Installation (1974) p. 12. It is relevant to note that towing an offshore oil rig on a barge or pontoon - also known as "dry" tow - is safer than on the rig's own hull. Insurance rates for "dry" tow are significantly lower than for conventional tows. A fuller treatment of this issue can be found in Watson, "The Use of Barges and Pontoons for the Carriage of Dredgers, Rigs and Floating Equipment," (1977-78) 66 Journal of Insurance Institute of London 86. Cf. Garrod, "Rig Towing - The Need for High Horsepower Tugs and the Specialist Operator," in Financial Times Ltd., Offshore Development (1975) Vol. 1, pp. 74, 75. As has been reported, one jack-up type drilling rig built by Hitachi Zosen in Japan for a drilling company of Abu Dhabi was so designed that the legs could be completely contained in the platform, allowing it to be carried on the deck of a barge. See Financial Times, October 3, 1979, p. 12.

11. Lloyd's Register has recommended that stability

3. Insurance arrangements

At the exploration stage, seismic surveys are usually carried out by survey contractors, whereas exploratory drillings are undertaken by independent drilling contractors. As survey and drilling contractors normally perform the operations by using their own equipment, the physical damage insurances covering

calculations should be required in the interests of underwriters and safety. See Smedley, "The Inspection and Certification of Offshore Structures," in Institute of Petroleum, Offshore Oil Needs Onshore Fabrication (papers presented at a conference held in Glasgow on February 19, 20, 1975) p. 4. On the question of stability of offshore floating rigs, see Chevallier, "The Offshore Drilling Problem from Floating Units," in Financial Times Ltd., Offshore Development (1975) Vol. 2, pp. 140-147. See also Department of Energy, Offshore Research Focus, No. 1 (March 1977) p. 2. Despite the statutory requirements contained in Schedule 2, Part IV of the Offshore Installations (Construction and Survey) Regulations 1974, S.I. 1974 No. 289, there is still scope for improvement in the stability of floating rigs when subjected to wind and sea. That is why the Department of Energy recently signed an agreement with a Scottish engineering consultancy for a 12-month study into a system of stabilising such rigs. See The Scotsman, March 12, 1981, p. 3. Significantly, the commission of inquiry into the Alexander Kielland disaster pointed out in its final report that stability calculations at the design stage failed to consider that the rig might lose one of its five legs.

their facilities are, in practice, obtained and maintained by themselves.

After the completion of the exploration phase, production facilities consisting of fixed platform and pipelines etc. are installed in position during the so-called construction and maintenance period. As far as the North Sea practice is concerned, such facilities - usually owned by the operator and its co-venturers in the case of a joint venture - can be insured under a builders' risk policy. The duty to obtain such a coverage is almost invariably imposed upon the operator, as the joint operating agreement would so require. In this connection, it must be reiterated that such an insurance - generally known as the C.I.C.M. insurance - offers liability coverage¹² as well, which has been discussed above.

Once the production period begins and the C.I.C.M. policy has ceased to be in force, drilling operations are resumed - but they are no longer of an exploratory nature. Rather, they include the drilling of deviated¹³ holes and even water injection wells. Joint venturers

12. See above, Chapter 3.

13. On deviation drilling systems, see Brumley, "Deviation

now manage to arrange their own liability coverages in one way or another, with the same applying in the Norwegian sector.¹⁴ As to the physical coverage during the production period, a single policy may again be organised. Alternatively, each licensee can resort to separate policies covering the value of his share of the production equipment.

4. Insurance policies

Articles of earlier years have indicated that there are two basic types of property insurance forms covering non-fixed drilling rigs, i.e. the "all-risks" policy and the "stated-peril"¹⁵ form. Briefly, the former covers - subject to specific exclusions - risks of direct physical loss or damage to the rig insured; whereas the latter details a list of occasions on which

Drilling System - Methods and Results," in Financial Times Ltd., Offshore Development (1975) Vol. 1, pp. 204-207.

14. Interview with Mr. Johnassen of Statoil, Stavanger, on May 20, 1980.

15. Mead, "Insurance Coverage of Offshore Drilling and Production Operations," (1957-58) 32 Tulane Law Review 207, at pp. 212-213; Hill, "The Insurance of Oil-Drilling Rigs," (1960) 57 Journal of the Chartered Insurance Institute 65, at pp. 74-77.

underwriters will accept liability. Opinions vary as to which of these two standard forms should be prevailing. On the whole, nevertheless, the all-risks form provides a broader cover. One of the principal advantages of the stated-perils form is the fact that the form employs traditional marine language which is believed to be better suited to offshore units.¹⁶ Understandably, this assertion raises the continuing argument as to whether offshore rigs are ships or vessels.

With the advent of standard forms which are especially designed for offshore rigs and which have been gradually dominating the offshore insurance market, the emphasis upon the afore-mentioned approach dividing offshore property coverages into all-risks and stated-perils appears to be waning. It is therefore submitted that the following tentative classification may be of more practical assistance in examining offshore property coverages now on the scene:

16. Mead, op cit (supra note 15) at p. 213.

(1) Non-fixed units; their physical damage coverages may still be generally termed Marine Hull Insurance so as to echo the I.A.D.C. contract phraseology,¹⁷ notwithstanding the argument as to whether they are vessels.

(a) ship-shaped: usually covered by the Institute Time Clauses (Hulls) or similar hull forms;¹⁸

(b) other than ship-shaped: the London Standard Drilling Barge Form is representative of such coverages;

(2) Fixed units: the C.I.C.M. insurance affords major¹⁹ protection.

In this connection, it is necessary to bear in mind that the coverage offered by the Norwegian hull conditions aimed at mobile rigs, known also as DV-kasko, extends to both (a) and (b) above.

17. However, this does not lead to the inference that oil-rig insurance is within the purview of conventional marine insurance. Further discussed below.

18. E.g. the American Institute Hull Clauses.

19. During the operational period, however, a separate policy like London Standard Platform Form is usually needed.

While it is not proposed to examine the Institute Time Clauses (Hulls) in greater detail, the following discussion is intended to describe the London Standard Drilling Barge Form, the Norwegian DV-kasko, and the C.I.C.M. insurance (property aspects) separately.

B. The London Standard Drilling Barge Form 1972

1. Introductory remarks

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In Summerskill's Oil Rigs: Law and Insurance, the London Standard Drilling Barge Form is described and analysed on a clause by clause basis. To avoid repetition, the present section ventures to give some coverage of some matters which Summerskill's discussion seems to have omitted, and also of certain points which merit further emphasis or observations than his work has displayed.

2. The cover

Clause 5 of the London Standard Drilling Barge Form (hereinafter the L.S.D.B. Form) provides:

"COVERAGE:

Subject to its terms, conditions and exclusions this insurance is against all risks of direct physical loss of or damage to the property insured,

20. Sub-titled Some Aspects of the Law and Insurance Relating to Offshore Mobile Drilling Units.

provided such loss or damage has not resulted from want of due diligence by the Assured, the Owners or Managers of the property insured, or any of them."

The wording of cl. 5 seems to have contributed to the belief that the present insurance is of an all-risks nature. With the exclusions being so many and substantial, nevertheless, this general assumption may have to be qualified.

It is necessary to bear in mind that the L.S.D.B. Form also deals with collision liability and sue and
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 labour expenses, which form a separate and additional coverage. Therefore any suggestion that the policy covers only the physical damage in respect of a drilling unit should be repudiated. The collision liability of the owner of the drilling barge is covered in full under the present insurance. This is in contrast but not necessarily in contradiction to the established English practice of marine insurance whereby three-quarters of collision liability is covered by a marine hull policy, with the remaining one-fourth being insured against under a liability -usually a P & I - policy.

It is evident from cl. 5 that there can only be recovery in respect of direct physical loss of or damage to the drilling unit. Such a qualified commitment which necessarily involves the question of causation is of particular importance in relation to offshore accidents like the Alexander Kielland tragedy, a disaster of considerable insurance significance.²² Among many indirect losses occasioned by the tragic event has been the immense cost for righting the capsized rig, which runs as high as £4.5 million.²³ The accident involved in Caltex Oil (Australia) Pty. Ltd. v. The Dredge 'Willemstad', (1976) 136 C.L.R. 529 is also illustrative of the importance of such a direct-loss clause.²⁴

22. Little is known of the type of the insurance policy under which the rig was insured. It has however been reported that the Norwegian insurers - the Norwegian Oil Insurance Pool - have declared the rig a total loss and its owner Stavanger Drilling accepted £24.8m in compensation. See The Times, January 9, 1981, p.13; Financial Times, January 28, 1981, p. 2. The nature of the Norwegian Oil Insurance Pool (Norsk Oljeforsikringspool) are noted in Braekhus and Rein, Insurance Conditions for P & I Insurance of Drilling Vessels (1976) pp. 30-32.

23. For details, see Financial Times, Oct. 22, 1980, p.31.

24. In Caltex a dredge fractured an oil pipeline which

If the loss or damage has resulted from want of due diligence by the assured, the owners or managers of the rig, when the insurer is exempted from liability. It should however be remembered that want of due diligence does not disentitle the assured from recovery in the case of an offshore employer's liability insurance.²⁵ There may therefore be a unique situation in which the employer's liability insurer is barred from disclaiming his liability for the above reason whereas the hull underwriter is not, of which the present L.S.D.B. Form is one manifestation.

The proviso referring to want of due diligence is also where the difficulty lies. In Coast Ferries Ltd. v. Century Insurance Co. of Canada and Others,²⁶ the "want of due diligence" exclusion was directly at issue. It was undisputed that in Coast Ferries the partial

connected an oil refinery with an oil terminal. The court held that the economic loss incurred in providing alternative means of transporting the oil was recoverable. The Caltex case is discussed in Hayes, "The Duty of Care and Liability for Purely Economic Loss," (1979) 12 Melbourne University Law Review 79; Comment, "Economic Loss and the Tort of Negligence," (1980) 12 Melbourne University Law Review 408.

25. See above, p. 177, note 70.

26. [1973] 2 Lloyd's Rep. 232.

loss in respect of a vessel was caused by the improper loading. The trial judge held that the improper loading was due to want of due diligence by the owner who had employed a competent and fully qualified master and had left the entire operation of loading to him. The Court of Appeal reversed, holding that the owner of the vessel, while leaving full responsibility for the loading to the master, was under a duty to furnish him with sufficient information about minimum freeboard and trim for the vessel to enable the master to exercise sound judgment in loading. Thus the failure of the owner to do so constituted its want of due diligence, which exempted the insurer from liability under the policy.

Bearing in mind the ruling in Coast Ferries, it has to be asked immediately whether non-compliance with statutory safety regulations in respect of an oil rig is within the purview of the present proviso under consideration.

By virtue of the Mineral Workings (Offshore Installations) Act 1971, the Secretary of State is empowered to make regulations for, among others,

the safety of offshore installations.²⁷ The principal regulations made thereunder are the Offshore Installations (Operational Safety, Health and Welfare) Regulations²⁸ 1976 in which stringent operational rules are laid down. In addition, the provisions of section 11 of the 1971 Act which makes provision for civil liability for breach of statutory duty apply to the duties imposed on any person by the 1976 Regulations.²⁹

It must be admitted that want of due diligence is clearly distinguishable from the notion of non-compliance with statutory duties. It may be unsound and unjust if the courts' judicial discretion in construing the proviso were dominated by such statutory instruments. Nevertheless, it would be equally difficult in practice to disassociate them from each other, especially in view of the fact that duties of the major parties in respect of their offshore

27. Section 6 of the Act.

28. S.I. 1976 No. 1019.

29. Section 11(1) of the Act.

operations have been legally standardised to a very considerable extent. Putting all this together, the suggestion would be that the more statutory safety regulations there are, the more likely the insured will lose its claim against the insurer; although it is the safety of offshore installations, rather than offshore hull underwriters, that concerns the draftsmen of such regulations.

3. Inherent vice exclusion

Among many exclusions, there is no liability under the present L.S.D.B. Form in respect of wear and tear, gradual deterioration, metal fatigue and so on. These are matters which may be covered by the term "inherent vice". As far as the Marine Insurance Act 1906 applies,³⁰ the exclusion of inherent vice is an implied one unless³¹ the policy provides otherwise. However, an analytical reading of the present exclusions would suggest that the insurer is still liable for direct physical loss of or damage to the rig resulting from or caused by

30. Subject to the discussion at pp. 230-242 below.

31. Section 55(2)(c) of the Marine Insurance Act 1906.

such inherent vice. This clarification should prove vital in oil rig insurance. Because there is every evidence which demonstrates that there is much chance of this happening, to which the Alexander Kielland disaster bears testimony. It has been suggested^{31a} that metal fatigue was the most likely explanation for the collapse of the rig.

4. Removal of debris

Exclusion (i) of cl. 8 refers to claims "in connection with the removal of property, material, debris or obstruction, whether such removal be required by law, ordinance, statute, regulation or otherwise." Significantly, similar exclusion can be found in other property coverages. Nevertheless, costs or expenses incidental to the removal of wreckage or debris are usually recoverable under a coverage attached to a P & I insurance, but normally only to the extent that the removal is compulsory by law. Coverages which do not distinguish between removals made compulsory

31a. By, among others, Mr. Odd Osland, chief engineer of the Alexander Kielland rig. His view has been endorsed by the final report on the catastrophe.

by law and others are also obtainable, subject of course to appropriate premiums.

One of the examples where the removal is compulsory by law may be given of the US Corp of Engineers which can compel the operator to remove any wreck or debris at his own expense once the licence or drilling permit is granted. In that case, the drilling contractor -
31b
who is normally the insured under the P & I policy - actually effects the insurance on behalf of the operator.

Notwithstanding the law requiring compulsory removals, it is not unusual to find that the responsibility for such costs is also specified in drilling contracts. Under the I.A.D.C. contract, for example, this responsibility is placed upon the operator. Clause 1006 of the contract provides:

"Operator shall be liable for the cost of regaining control of any wild well, as well as the cost of removal of debris, and shall indemnify Contractor for any such cost regardless of the cause thereof, including, but not limited to the negligence of Contractor, its agents, employees and subcontractors."

Therefore, when the indemnification is made by the underwriters in respect of the cost, the underwriters

31b. Under the US Rivers and Harbors Act 1970.

become subrogated against the operator for recourse unless waiver of subrogation has been procured.

At the time of writing, there is not equivalent legal requirement for compulsory removals in the

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British sectors of the North Sea. In practice, however,

32. The statutory provisions regulating wreck removal include ss. 510-536 of the Merchant Shipping Act 1894, and s. 56 of the Harbours, Docks, and Piers Clauses Act 1847. For the purposes of the Merchant Shipping Act, wreck includes "jetsam, flotsam, lagan, and derelict found in or on the shores of the sea or any tidal water." (s. 510(1)) It is important to note that the property must be a ship, her cargo or a portion thereof. See 35 Halsbury's Laws of England (3rd ed.) 721. In this context, a gas buoy which has become adrift is not a wreck: Wells v. Gas Float Whittan No. 2 (Owners), [1897] A.C. 337, H.L.; 8 Asp. M.L.C. 272. For application of the law of wreck removal to aircraft, see the Aircraft (Wreck and Salvage) Order 1938, S.R. & O. 1938 No. 136 and the Civil Aviation Act 1949, s. 51.

S. 56 of the Harbours, Docks, and Piers Clauses Act 1847 provides:

"The harbour master may remove any wreck or other obstruction to the harbour, dock, or pier, or the approaches to the same, and also any floating timber which impedes the navigation thereof, and the expence of removing any such wreck, obstruction or floating timber shall be repaid by the owner of the same, and the harbour master may detain such wreck or floating timber for securing the expences, and on nonpayment of such expences, on demanded, may

there may be operational eventualities where the removal could be necessary or advisable, and thus the insurance coverage. It is therefore important to ensure that the proper insurance - covering the cost of removals whether compulsory by law or not - is obtained. This leads to the conclusion that the silence of law in respect of the removal of wreck necessitates the purchase of broader coverages. While it is right to feel sceptical about whether this is justified, the issue under consideration is persuasive evidence that the necessary co-ordination of the law and oil rig insurance is yet to be achieved.

5. Blowout preventer warranty

So far as oil rig insurance is concerned, loss prevention has been increasingly regarded as one of the
 33
 important risk evaluation factors. A clue to this may

sell such wreck or floating timber, and out of the proceeds of such sale pay such expences, rendering the overplus, if any, to the owner on demand."
 (Emphasis added)

A literal reading of s. 56 would suggest that wrecked offshore installations may fall within the purview of the section. Apart from that, there is no statutory basis for compulsory removals.

33. Jackson, "Petroelum Industry Catastrophe Parameters: The American Viewpoint," International Business Lawyer Vol. 5(iv)(October 1977) 486, at p. 490.

lie in the Blowout Preventer Warranty Clause contained in the L.S.D.B. Form, which provides:

"The Assured warrants and agrees that blowout preventers of standard make will be used, same to be installed and tested in accordance with the usual practice."

Notwithstanding the definition of the term "blowout" set out in the present Form, there is virtually no single explanation for its happening. When a blowout occurs, considerable physical damage to the rig would normally follow. In practical terms, too much would be at stake for a blowout to be allowed to happen and it is extremely difficult to quantify the damaging results. As is treated in the following Chapter, blowout is also a major cause of offshore oil pollution. From an insurance standpoint, therefore, the potential losses arising therefrom are never to be counted only in physical damage context.

However preventive they may be, the functionability of blowout preventers should be treated with suspicion in view of the recent Ixtoc I blowout in the Gulf of Mexico. Apart from that, negligent handling of blowout

preventers is sometimes a contributing element.

There are reasons to suppose that the wording of the present warranty clause may arouse controversy. Firstly, it is open to question what the "standard make" implies, when the standard, if any, has not been translated into any binding rule with mandatory effect. Secondly, there are considerable doubts as to the meaning of "the usual practice". Recommending the safe practice for oil drilling, the Institute of Petroleum concludes that even such equipment may "vary from well to well to suit anticipated or known pressure conditions..."³⁶

6. Applicability of the Marine Insurance Act 1906

The fact that the L.S.D.B. Form does not contain a choice-of-law clause necessitates a consideration of the potential applicability of the Marine Insurance

35. See Brask, "Blow-out in the North Sea," Lloyd's Maritime & Commercial Law Quarterly, (August 1975) 271, at p. 273. See also "Blow-out," Noroil, Vol. 5, No. 5 (May 1977) pp. 43, 44.

36. Institute of Petroleum, Code of Safe Practice for Drilling and Production in Marine Areas (2nd ed. 1972, 1980) p. 34.

Act 1906. Logically, raising queries about that issue also raises the question as to whether oil rig insurance is marine insurance. A brief article by Summerskill³⁷ featuring some aspects of the latter point has proved to be a significant attempt. Summerskill's approach, of which the emphasis was largely on the interpretation of the relevant statutes, is heavily associated with the definition of ships or vessels for purposes of such statutes. This is very similar to the attitude taken by some other writers. As has been noted elsewhere in this work, there are longstanding differences of view on the issue of definition. In approaching this point, Summerskill, with remarkable academic caution, proceeds throughout on the stated assumption that the 1906 Act applies.

A contract of marine insurance is defined by the Marine Insurance Act 1906 as a contract whereby "the insurer undertakes to indemnify the assured, in manner and to the extent thereby agreed, against marine losses, that is to say, the losses incident to marine adventure."³⁸

37. Summerskill, op cit (supra note 20) Appendix C.

38. Marine Insurance Act 1906, s. 1.

This definition covers insurances on ship or goods, freight or profits. Nevertheless, every lawful marine adventure may also be the subject of a contract of marine insurance.³⁹ In particular, there is a marine adventure where "any ship goods or other moveables are exposed to maritime perils."⁴⁰ (Emphasis added)

It may be argued that the term "other moveables" is wide enough to include offshore oil installations. However, a literal reading of section 90 may suggest otherwise. By that section, "moveables" means "any moveable tangible property, other than the ship, and includes money, valuable securities, and other documents." (Emphasis added)

The definition contained in section 90 strongly suggests that "moveables" refer to movable objects connected with the ship insured.⁴¹ It is therefore difficult to resist the conclusion that the legal basis

39. Section 3(1).

40. Section 3(2)(a). In this context, "maritime perils" means perils consequent on, or incidental to, the navigation of the sea.

41. Cf. Summerskill, at p. 457.

for treating oil rig insurance as marine insurance for the purposes of the 1906 Act is not evident. It is equally difficult to maintain that oil rigs come within the definition of "ship" for the purposes of the Act.⁴²

If non-fixed oil rigs were classified as ships for the purposes of the 1906 Act as a result of a legislative effort,⁴³ some of the problems would be simplified. Relatively speaking, however, such an approach towards that direction only makes a marginal contribution to the real problem. In other words, the problem which should be urgently examined cannot be resolved in the long term simply by classifying oil rigs as ships. Is the classification significant enough to warrant a full application of the Act? It is perfectly appropriate to subject

42. Rule 15 of the Rules for Construction of Policy attached to the Act states:

"The term 'ship' includes the hull, materials and outfit, stores and provisions for the officers and crew, and, in the case of vessels engaged in a special trade, the ordinary fittings requisite for the trade, and also, in the case of a steamship, the machinery, boilers, and coals and engine stores, if owned by the assured."

It would seem that the Rule does not purport to define a ship.

43. For example, the Marine Insurance Act 1906 has been made applicable to the insurance of hovercraft: the

oil rig insurance to statutory regulation. However, is it equally appropriate to subject the insurance to the 1906 Act in a realistic sense? If the insurance of non-fixed rigs were governed by the Act, should the same apply to fixed rigs? Questions like this may shed light on whether oil rig insurance should be brought under control of statutory regulation other than the 1906 Act.

It is undeniable that the 1906 Act, which was drafted with the intention of regulating the insurance associated with maritime shipping, is by far the nearest in nature to oil rig insurance. The introduction of marine perils, particularly those related to self-propelled rigs, is probably the major valid defence for its applicability to oil rig insurance. Indeed oil rig insurance and conventional marine insurance have some significant features in common, yet the fact remains that the traditional marine insurance concepts which may be applicable to oil rig insurance without any change are virtually confined to insurable

interest, disclosure and representations, assignment of policy, and the premium.

Common sense decrees that there are important differences between conventional marine ventures and offshore oil activities. One point among many is the fact that offshore oil and gas operations are deeply associated with the seabed, both above and below it. Certain risks of particular relevance to offshore ventures like blowouts and leaks in offshore pipelines are virtually unknown to conventional marine insurance concepts.⁴⁴ In addition, offshore installations - whether ship-shaped or otherwise, or those between them - have been and are being developed. Even if the 1906 Act is applicable - which is very much in doubt - there are bound to be more doubts as to whether it should continue to apply in the near future.⁴⁵

44. On other safety and health hazards incidental to offshore operations, which may exert considerable influence in oil-related insurance, see Farmer, "Health and Safety Hazards in North Sea Oil," (1976-77) 65 Journal of the Insurance Institute of London 46; see also the International Labour Office, Safety Problems in the Offshore Petroleum Industry (1978) 19.

45. Obviously, such doubts would not apply to hovercraft.

The purpose of the preceding analysis is to demonstrate that the distinctive novelty of oil rig insurance deserves more acknowledgment, which should also be reflected and crystallized into an actual legal regime. There is much evidence that a significant distinction between conventional ships and oil rigs has been admitted, whether with reluctance or not. Principal indications are the regulations made under the Mineral Workings (Offshore Installations) Act 1971, which have impliedly recognised the unique features of offshore installations as opposed to conventional ships or vessels.⁴⁶ This must also help to discern the spirit behind the draft International

46. Examples include the registration of offshore installations, the appointment of installation managers, the holding of public inquiries into accidents. The statutory instruments governing those areas are the Offshore Installations (Registration) Regulations 1972, S.I. 1972 No. 702; the Offshore Installations (Managers) Regulations 1972, S.I. 1972 No. 703; the Offshore Installations (Public Inquiries) Regulations 1974, S.I. 1974, No. 338. It is important to note that these regulations do not have effect in relation to conventional ships or vessels. For an approach to certain statutory instruments made under the 1971 Act, see Cadwallader, "Legal Aspects of Safety of Offshore Installations," Lloyd's Maritime & Commercial Law Quarterly (February 1977) pp. 53-63.

Convention on Off-Shore Mobile Craft. The 1977 draft Convention, although it purports to apply certain maritime law principles to non-fixed oil rigs, has in essence increased rather than weakened support for the proposition that offshore non-fixed rigs, were it not for the draft Convention, should be treated differently from conventional ships or vessels in many important aspects.

Evidence from the insurance sector is also evident. So widespread now is the impression that policies specially designed for oil rigs have been in great demand. It is difficult not to see this as a sign that so far as oil rigs are concerned conventional marine insurance policies are deficient or impractical, or both. The same applies to offshore liability insurances, although in some areas coverages based upon conventional policies have been working with a moderate degree of success. With the scale of

47. See above, p. 146.

48. E.g. P & I policies. However, the demand for liability coverages specially designed for offshore oil rigs is equally evident from the appearance of the Norwegian P & I conditions for drilling vessels.

oil and gas activity expanding, it is much clearer than it was that oil rig insurance should be based on a more distinctive legal ground. And lessons drawn from offshore new technology have added to the need for a significant transformation.

As conventional marine insurance is essential to maritime shipping activities, so is oil rig insurance to offshore ventures. While the distinction between these two insurances widens, the 1906 Act is all the more unlikely to be able to sustain - if ever - oil rig insurance. So far as the Act itself is concerned, some - if not many - sections are of little significance in relation to offshore oil and gas activities, such as those dealing with the voyage and loss of freight. In fact, the present L.S.D.B. Form has also tended to sound a warning note. Examples include the different approaches between the L.S.D.B. Form and the 1906 Act towards constructive total loss.⁴⁹

49. Clause 12 of the L.S.D.B. Form provides:

"CONSTRUCTIVE TOTAL LOSS:

There shall be no recovery for a Constructive Total Loss hereunder unless the expense of recovering and repairing the insured property

The same is true of the discovery of records.

All this means a strengthening of the assertion that the time is ripe for legislative measures to be

shall exceed the actual insured value.

In no case shall Underwriters be liable for unrepaid damage in addition to a subsequent Total Loss sustained during the period covered by this insurance."

By contrast, section 60(2) of the 1906 Act states:

"In particular, there is a constructive total loss:

(i) Where the assured is deprived of the possession of his ship or goods by a peril insured against, and (a) it is unlikely that he can recover the ship or goods as the case may be, or (b) the cost of recovering the ship or goods, as the case may be, would exceed their value when recovered; or (ii) In the case of damage to a ship, where she is so damaged by a peril insured against, that the cost of repairing the damage would exceed the value of the ship when repaired. In estimating the cost of repairs, no deduction is to be made in respect of general average contribution to these repairs payable by other interests, but account is to be taken of the expense of future salvage operations and of any future general average contributions to which the ship would be liable if repaired.

....."

50. Clause 16 of the L.S.D.B. Form states:

"DISCOVERY OF RECORDS:

During the currency of this insurance or any time

initiated, which should bring under effective mandatory control the insurances of both fixed and non-fixed rigs. The transformed situation, nonetheless, should not necessarily reflect a complete departure from the 1906 Act. Nor should it preclude the possible applicability of the Act to oil rig insurance where appropriate. It is hoped that such an effort should be one of the keys to a successful legal framework in which viable oil rig insurance can be further developed as it deserves to be.

51

In Edinburgh Assurance Company v. R.L. Burns Corp.,
an insurance policy covering a salvage operation on a
floating drilling rig was in dispute. During the

thereafter within the period of the time provided for in Clause 17 for bringing suit against these Underwriters, these Underwriters shall have the right of inspecting the Assured's records pertaining to all matters of cost, repairs, income and expenditures of whatsoever nature relating to the properties insured hereunder, such records to be open to a representative of these Underwriters at all reasonable times."

In brief, the rights in respect of discovery of records given to the L.S.D.B. underwriters by cl. 16 are greater than those given to insurers under the 1906 Act.

operation, the rig collapsed in a storm and sank into the sea. The underwriters disclaimed their liability by asserting that the rig was not an actual total loss for the purposes of the policy. Having concluded that English law applied to the definition of the term "actual total loss", the court proceeded to analyse section 57(1) of the Marine Insurance Act 1906 without regard to the applicability of the Act. To that extent, the approach invoked by the court appears to be without

52

sound logical basis.

Another indication that the applicability of marine insurance law is important in determining offshore underwriters' liability concerns the proposed changes in the rule of non-disclosure in insurance law. In brief, the present law imposes a duty on the insured to disclose to the insurer all material information relating to the proposed contract of insurance.

52. A general discussion of the decision can be found in a recent legal article. See Margo, "The Anglo-American Scene," Lloyd's Maritime & Commercial Law Quarterly, (February 1981) pp. 83-92. The writer of that article seems to have paid no adequate attention to the point under consideration.

Following a Working Paper published in 1979,⁵³ the Lord Chancellor in October 1980 presented to Parliament the Report of the Law Commission on Insurance Law.⁵⁴ The Law Commission suggests in the Draft Bill attached to the Report that the duty of the insured to disclose should be reduced to a considerable extent.⁵⁵ Significantly, the Bill exempts marine, aviation and transport insurance.⁵⁶ Nothing in the Bill serves to clarify the confusion as to whether oil rig insurance should be classified as marine insurance.

C. The Norwegian hull conditions

1. Introduction

Workable as traditional marine policies may be, the demand for coverages specially designed for offshore

53. Working Paper No. 73. A description of the central theme of the Paper can be found in Financial Times, May 22, 1979, p. 10.

54. Cmnd 8064.

55. For a brief comment on the subject, see "The Reform of Insurance Law," The Journal of Business Law, (January 1981) pp. 1-3.

56. Insurance in these fields is also known as MAT insurance.

oil rigs has been increasingly evident. The appearance⁵⁷ of the Norwegian hull conditions, also known as DV-kasko, marks another move towards the development of such coverages.

The origin of the Norwegian form has been briefly⁵⁸ described in Chapter 3. While a commentary on the conditions has been published, no attempt is to be made in the present section to discuss the coverage in detail. As the Norwegian form provides a contrast to the L.S.D.B. Form, it has acquired additional significance which may serve useful purposes.

2. Property insured

The first point to be made about the Norwegian conditions concerns the items insured thereunder. In addition to the drilling rig scheduled in the policy with all its machinery and equipment on board, the Norwegian conditions extend to such machinery and equipment while on board other vessels moored alongside

57. See above, p. 113.

58. By Dr. jur. Sjur Braekhus, Professor at the University of Oslo. A copy of the commentary was made available to the writer through the courtesy of the Scandinavian Institute of Maritime Law, Oslo.

or in the vicinity of the insured rig and used in
⁵⁹
 connection with that rig. A similar coverage can be
 found in the L.S.D.B. Form, with such other vessels
⁶⁰
 themselves being expressly excluded. Although no
 clear exclusion of such other vessels themselves
 is referred to in the Norwegian conditions, it could
 hardly be construed as covering such vessels.

It should be observed that the possibilities
 of covering more than one drilling rig by one policy
⁶¹
 are very real under the L.S.D.B. Form. By contrast,

59. Clause 4 of the Norwegian conditions.

60. Clause 3 of the L.S.D.B. Form.

61. This is discernible from the wording of cl. 3 of
 the L.S.D.B. Form, which provides:

"PROPERTY INSURED HEREUNDER

This insurance covers the hull and machinery of
the drilling barge(s), as scheduled herein,
 including all their equipment, tools, machinery,
 caissons, lifting jacks, materials, supplies,
 appurtenances, drilling rigs and equipment,
 derricks, drill stem, casing and tubing while
 aboard the said drilling barge(s) and/or on
 barges and/or vessels moored alongside or in the
 vicinity thereof and used in connection therewith
 (but not such barges and/or vessels themselves),
 and including drill stem in the well being drilled,
 and all such property as scheduled herein, owned
 by or in the care custody or control of the Assured,
 except as hereinafter excluded." (Emphases added)

a literal reading of cl. 4 of the Norwegian form suggests that the Norwegian policy is not intended to cover more than one drilling rig.

It has been reckoned that the coverage given by the Norwegian conditions with regard to the drilling rig's equipment is not as wide as that under the L.S.D.B. Form.⁶² Among the equipment excluded under the Norwegian conditions are the helicopters stationed on board the insured drilling rig.⁶³ It is easy to understand that such items are usually covered by aviation insurance. The L.S.D.B. Form makes no specific mention of such exclusions. There is some doubt as to whether they are meant to be excluded.

3. Exemption of liability

A further complexity is the question of the insurer's liability. The Norwegian conditions are based upon the Norwegian Insurance Plan of 1964, which exempts the insurer partly or wholly from liability in the case where there has been blameworthy conduct

62. See the commentary (supra note 58) at p. 77.

63. Clause 4(4)(c) of the Norwegian form.

on the part of the insured. And it is by virtue of section 20 of the Norwegian Insurance Contracts Act that the insurer may disclaim its liability when the negligence of the insured is deemed gross negligence. Nevertheless, this must in turn be qualified by section 56 of the 1964 Plan which provides that the liability of the insurer, in the event of gross negligence on the part of the insured, shall be decided according to the degree of blame and other circumstances of the case. A comparison between the Norwegian conditions and the L.S.D.B. Form, in which the determining factor⁶⁴ lies solely in "want of due diligence", still shows some resemblance in their nature. While each case must be dealt with on its merits, it is hard to lay down any set rule.

4. Drilling of relief wells

Clause 5(3) is primarily directed at the exclusion of perils in respect of the drilling of a relief well performed by the insured rig for the purpose of controlling or attempting to control a fire, blowout or

64. See above, pp. 218, 219.

cratering associated with another drilling rig. Under the L.S.D.B. Form such perils are also excluded "unless immediate notice be given to Underwriters of said use and additional premium paid if required."⁶⁵

From a practical standpoint, the drilling of relief wells is a usual but not necessarily the only method to be used to control blowouts. Its principal function is to reduce the pressure and eventually stop the oil flow. An illustrative example may be given of the Ixotic I blowout. The well off Mexico's Yucatan Peninsula blew out on June 3, 1979 when a hot drill⁶⁶ hit a pocket of gas and oil. With enormous manpower and resources, it took two months to complete the two relief wells.

It must be emphasised that the insurer is not liable if the drilling of relief wells is performed by the insured rig to control a blowout associated with another drilling rig. One practical explanation must be that the drilling rig associated with the

65. Clause 8(c) of the L.S.D.B. Form.

66. See above, p. 210.

blowout may have sustained considerable damage or even totally destroyed. In the case of the L.S.D.B. Form where it is possible to insure two drilling rigs under a single policy, it is worth inquiring whether the insurer is liable if the relief drilling has been performed by one of the insured rigs to control a blowout associated with the other drilling rig.⁶⁷

Some consideration should also be given to the drilling of water injection wells. The present exclusion does not include a reference to the drilling of such wells, which is one way of maintaining the pressure needed for the production of oil and is regarded by some oil companies as a means of significantly increasing the oil recovery.⁶⁸ Even if such perils are coverable under the present Norwegian

67. Clause 8(c) of the L.S.D.B. Form excludes liability in respect of -

"Loss, damage or expense caused whilst or resulting from drilling a relief well for the purpose of controlling or attempting to control fire blowout or cratering associated with another drilling barge, platform or unit unless immediate notice be given to Underwriters of said use and additional premium paid if required." (Emphasis added)

68. Phillips Petroleum has been given Norwegian Government

conditions, it would seem that the risks are relatively slight.

5. The special safety regulations

As has been remarked, the L.S.D.B. Form contains
⁶⁹
 a blowout preventer warranty. It has therefore been
 suggested that under section 33(3) of the Marine
 Insurance Act 1906 breach of that warranty should
 free the insurer from liability whether or not the
⁷⁰
 breach brought about the casualty. Nonetheless, this
 belief should be discredited when the applicability
⁷¹
 of the Act is still in doubt.

In the context of the Norwegian conditions, the
 requirement for installing blowout preventers does
 not take the form of a warranty. Rather, it is
 considered a special safety regulation in relation

approval to operate such a water injection scheme at
 its North Sea Ekofisk Field, as reported in Financial
 Times, September 27, 1979, p. 3.

69. See above, p. 228.

70. Summerskill, op cit (supra note 20) at p. 196.

71. See above, pp. 230-242.

to section 49 of the 1964 Plan. Practically speaking, the insured has a clear interest in installing blowout preventers, as no drilling rig short of blowout preventers is likely to be safe. In that sense, it seems unrealistic to insist that such a requirement should be in the form of a warranty, especially when the clause is so worded that interpretive controversy is very likely to arise.⁷³

6. Waiver of subrogation

The present Norwegian policy further provides in clause 15 that the insurer agrees to waive its right of subrogation against the owners, charterers, drilling contractors and operators of the insured drilling rig. This waiver of subrogation is automatic and unconditional.

Under the L.S.D.B. Form the underwriters also agree to waive their rights of subrogation against

72. Clause 6 of the Norwegian conditions.

73. This view has virtually been shared by the commentator who takes the position that the underwriters' interests are sufficiently protected by the blowout preventer rules being regarded as safety regulations.

any person firm or corporation which has been released by the insured from liability with respect to loss of or damage to property insured thereunder. The waiver is however subject to two conditions: (a) the said release is granted prior to the commencement of the operations; and (b) the loss or damage subject to said release arises out of or in connection with such operations.⁷⁴

Two points do deserve to be made. First, it would appear that the L.S.D.B. approach reflects more precisely the offshore operational practice. Clearly, those who may be released by the insured would include any contractor and sub-contractor carrying supply and maintenance works on board the insured rig. Such protection is however not available under the Norwegian conditions. Second, it can be assumed that the waiver of subrogation is postulated on the idea of contractual allocation of liability through indemnity agreements.⁷⁵ Although it is required in many drilling contracts that the drilling contractor (usually the owner of the drilling

74. Clause 15 of the L.S.D.B. Form.

75. See above, Chapter 2.

rig) should hold the operator harmless and that a waiver of subrogation by the contractor's insurer be procured, it seems the Norwegian conditions have missed the point that the opposite can happen, i.e. the drilling contractor to be indemnified by the operator, which will result in the automatic waiver being unjust and impractical.

7. Problems of the 1964 Plan

The present Norwegian conditions are governed by the Norwegian Marine Insurance Plan of 1964.⁷⁶

This coupled with the fact that the provisions of the Plan concerning ships apply correspondingly to the insured drilling rig, means a disengagement from the problems of interpretation confronting the L.S.D.B. situation. In a legal sense, therefore, the prolonged controversy associated with the clarification of oil rigs ceases to exist. Most significantly of all, insurance of floating oil rigs must now be considered marine insurance in the context of Norwegian legislation, although it does not follow that all rules in the Norwegian legislation applicable

76. Clause 1 of the Norwegian conditions.

to ships are automatically applicable to such rigs.

To a considerable extent, the broad effect of the Norwegian approach has been to reduce by legislative artifice the distinctive characteristics of oil rig insurance. Such an approach may promote diversity instead of uniformity of the law. First of all, insurance of fixed rigs is still subject to the rules which apply to other insurances. There is a necessary implication here that insurance of fixed rigs - although not dissimilar from that of floating rigs - is nor marine insurance in the context of Norwegian

⁷⁸ legislation. Ironically, it has been suggested that it is possible to insure fixed rigs on equivalent

⁷⁹ conditions. Taking into account these factors, there is no good cause for such divisions, other than the argument that floating rigs are ships whereas fixed rigs are not. This of course can hardly endorse the view that insurance of floating rigs must be marine

77. Braekhus and Rein, Insurance Conditions for P & I Insurance of Drilling Vessels (1976) at p. 29.

78. Rein, (et al.), Norwegian Petroleum Law (1978) p. 6-28.

79. Supra note 77.

insurance in real terms.

It must be added that the problem is bound to be magnified by the development of offshore technology which has been rapid and is continuing at a fast pace. This foreshadows the likelihood that the simple classification of oil rigs into ships and non-ships, or floating and fixed, could become simplistic in the foreseeable future. This lends support to the view already expressed that some amelioration of a legislative nature should be effected in favour of a fresh legal basis independent of marine insurance concepts.

On the face of it the applicability of the 1964 Plan to the present conditions seems to have presented no considerable difficulties. Yet there have been significant derogations in respect of constructive
80
total loss and deductibles. These and other factors have combined to confirm the warning that oil rig

80. Clause 7 dealing with constructive total loss is more strict than the corresponding paragraph in the 1964 Plan. As to deductibles, the departures can be ascertained by contrasting cl 11 of the conditions and ss. 189, 197 of the 1964 Plan.

insurance is without parallel in its essentials. In other words, there is no reason for automatically presuming that oil rig insurance and marine insurance can be lightly compared with each other.

D. Fixed-rig coverages

1. Schedules A and B of the C.I.C.M. insurance

Insurances of fixed production rigs during the construction and maintenance period, such as the C.I.C.M. insurance which is being used in the British and Norwegian sectors of the North Sea, are some of the most complicated insurances ever developed. As previously noted, a particular feature of the insurance is that it covers both physical losses and liability exposures. The liability aspects having been already⁸¹ dealt with, the present section is designed to give coverage to its property phases.

The insurable values under the present insurance are subject to two schedules. Schedule A states the insurer's overall liability in terms of money as regards physical damage. In other words, the figure

81. See above, Chapter 3.

specified therein represents the maximum limit of recovery, which is also the total value of the insured production rig when it is completed.

Individual but large components and entire segments of the rig are itemized in Schedule B which clearly reflects the separate value of each component for a defined stage. Properly computed new values are also designated in Schedule B in a cumulative manner as the components are assembled from time to time and constitute augmented new units, with increased values being established. In the event of loss of or damage to an item, the recovery is based upon the applicable value shown on Schedule B. The recovery varies in terms of compensation depending upon whether it is total or partial loss. Other factors taken into account include whether the damaged item is to be repaired or replaced. These are all regulated in cl. 7 of the written policy.

82. For a full account of the construction of offshore fixed production platforms, see Baldwin and Baldwin, Onshore Planning for Offshore Oil: Lessons from Scotland (1975) pp. 67-94.

2. Problems of the equipment exclusion

The objects to be covered under the insurance are also subject to the Interest Clause,⁸³ according to which property and equipment owned or used by contractors are in principle excluded. Also excluded are vessels or craft except as provided under the Collision Clause. This exclusion is of particular relevance to offshore diving operations, which are essential to inspection and maintenance. It is important to note that as far as diving techniques are concerned the idea now is to get rid of human divers altogether and to use a type of craft called an unmanned submersible.⁸⁴ The insurability of such craft under the present insurance is likely to become a prominent issue. The same applies to remote-controlled robots which are another alternative to human divers.⁸⁵

83. Clause 4 of the written policy.

84. "North Sea: Divers' Suits," The Economist, March 15-21, 1980, pp. 84, 85. Some technical aspects of manned and unmanned submersibles used in offshore diving operations are dealt with in the International Labour Office, op cit (supra note 44) pp. 37, 38.

85. It has been suggested that robots are likely to

Pipelines also call for special remarks. As separate policies for pipelines bringing oil and gas ashore are available in the market, only pipelines between installations are covered in the present C.I.C.M. context.

Problems caused by additional equipment associated with fixed production rigs may also cause concern. During the production period, some equipment may not even be considered until the government so requires. Illustrative examples may be given of the equipment for restricting gas flaring, and reinjection equipment.⁸⁶ Underwriters as well as oil companies should be fully conversant with such new technological developments. Only by doing so can a realistic insight be gained into the potential hazards.

replace divers in offshore oil operations. See Lloyd's List, July 16, 1979, p. 3. This is however not the generally accepted view, see in particular "Remote Controls Cannot Replace Human Divers," The Oil Register, p. iii, in The Scotsman, February 24, 1981.

86. A government decision to restrict gas flaring on the Brent Field, the biggest oil and gas field in the UK sector of the North Sea, was announced on October 29, 1979. The aim of the move was to conserve Britain's North Sea gas reserves, because 340m cu ft of gas

3. Miscellaneous coverages

The cover also extends to any components, pieces of equipment, or modules which have not yet been attached to the platform and which are stored, loaded, unloaded or in transit across land or water. As they are largely delivered by barges, it has been suggested that this is essentially a marine transport risk in which the insured property is treated like cargo.⁸⁷ In that sense, the attached Institute Cargo Clause should

from Brent was flared daily to enable the field to produce its rate of 185,000 barrels a day. Delays in installing equipment to restrict the flaring forced the Department of Energy to intervene. The government told Shell, operator of the field, that it should cut production to 100,000 barrels a day, which meant that only 170m cu ft of gas a day would have to be flared. There were plans to reinject the gas into the field until it could be piped ashore. However, Shell also had considerable technical difficulties with its reinjection equipment. Two months later, the Department agreed to changes after representations from the company. The limits would be on the amount of gas flared rather than the oil produced. See Financial Times, October 30, 1979, p. 1; The Daily Telegraph, December 22, 1979, p. 15.

87. See Swan, Ocean Oil and Gas Drilling and the Law (1979) p. 165.

be applicable.

Site preparatory work is also covered under cl. 9, A(i). The wording of the clause seems to imply that the preparation of the ocean floor, and cementing of the foundation or collar for the platform are included.⁸⁸

It is also apposite to consider cl. 14 which provides:⁸⁹

"All tows and towing arrangements to be approved by Noble Denton & Associates. Design & Project feasibility study to be approved by Det Norske Veritas."

As is further noted below, the power of the Norske Veritas, the Norwegian ship and rig classification society, has been highlighted by the inspection of 25 rigs in the Norwegian sector in the wake of the Alexander⁹⁰
Kielland disaster.

Loss, damage, or expense resulting from or attributable to faulty design, materials or workmanship is covered by the present policy. This is another unique feature of builders' risk insurance, to which the rig construction industry owes much of its development.⁹¹

88. Rein, (et al.), op cit (supra note 78) at p. 6-50.

89. Not applicable to the rigs in the British sector.

90. See below, p. 265.

91. One writer seems to have taken the view that such

This is also one of the perils coverable during the
⁹²
 maintenance period within which the perils insured
 against are more limited than those during the construc-
 tion period. As indicated above, the policy ceases to
 be in effect at the completion of the maintenance
 period. It should not be thought that the new policy
 covering the production period gives coverage to such
 perils as well. This is evidenced by cl. 7(f) of the
 London Standard Platform. The principle that such
 perils are normally not covered when the oil rig is
 in operation also applies to floating rigs. This is
 clear from the L.S.D.B. Form and the Norwegian hull

risks are uninsurable. See Vock, "The North Sea
 Lawyer: A Profile," (1978) 6 International Business
 Lawyer 67, at p. 69. The fact that such risks are
 covered in the present C.I.C.M. insurance is indeed
 a significant departure from the insurance practice
 in the construction industry. For example, it is
 provided in the Specimen Contractors' Combined Insurance
 Policy and Conditions that:

"The Company shall not be liable to indemnify the
 Insured in respect of:

1. (a) the cost of repairing, replacing or rectify-
 ing property which is defective in material or
 workmanship;
 (b) loss or damage due to fault, defect, error
 or omission in design plan or specification;
2."

92. See cl. 10(i) of the written policy.

conditions referred to above.

Pollution hazards are not insured against under the C.I.C.M. insurance. Nevertheless, the Institute Pollution Hazard Clause attached to the present insurance has the effect that loss of or damage to the insured rig caused by actions of the Norwegian state or any foreign governmental authority taken for the purpose of preventing or reducing pollution is recoverable.⁹⁴ This special coverage should be distinguished from those afforded by the insurance of seepage, pollution or contamination.⁹⁵

4. Earthquake and terrorist actions

Loss or damage caused by earthquake or volcanic eruption which is under the category of excepted perils in the case of the L.S.D.B. Form or the Norwegian hull conditions,⁹⁶ is covered under the C.I.C.M. insurance.

93. See cl. 8(f) of the L.S.D.B. Form and section 175 of the 1964 Plan as applied to the Norwegian hull conditions.

94. Only applicable to the rigs in the Norwegian sector.

95. See below, Chapter 6.

96. Cl. 8(a) of the L.S.D.B. Form and cl. 5(1) of the Norwegian hull conditions.

Such perils are in fact regarded in a negative light,
 as far as the Institute Clauses for Builders' Risks⁹⁷
 are concerned. But the exclusion contained in the
 Institute Clauses has been deleted when applying to⁹⁸
 the present insurance. It has been suggested that
 one of the reasons for the deletion is that the
 likelihood of earthquake or volcanic eruption in⁹⁹
 the North Sea is extremely small. This being the
 case, it does not suffice to explain why such perils
 are excluded under the insurance of floating rigs,
 which are reasonably less vulnerable to earthquake
 or volcanic eruption.

The cover against terrorist actions is afforded¹⁰⁰
 under the present insurance. It should be pointed
 out that the threat of any act for terrorist purposes

97. The Institute Clauses for Builders' Risks are standard clauses widely used as amendments to the insurance policies covering the construction of offshore structures. See Insurance Institute of London, Construction and Erection Insurance (1978) at 60.

98. Clause 9(A)(i) of the written policy.

99. Rein, (et al.), op cit (supra note 78) at p. 6-53.

100. Clause 9 of the written policy.

is a very substantial one, although it is not widely publicized. To guard against this, a proposal was made to set up a military force with the aim of coping with terrorist groups, foreign intervention as well as peaceful dangers facing oil rigs in the North Sea.¹⁰¹ As far as the C.I.C.M. insurance is concerned, some relief has been provided by the fact that the proposal has led to the forming of a 300-strong independent "reaction force"¹⁰² on May 1, 1980.

5. Other exclusions

Of all the excepted perils, those resulting from government ordinances and loss of use merit more attention than most.

The present policy excludes loss, damage, liability or expense arising from restraint, detainment etc. by the government in the form of administrative orders and so on.¹⁰³ The adverse effects of such orders can

101. As reported in The Scotsman, January 24, 1980, p. 4.

102. See Hetherington, "Why It Takes Comacchio to Ensure the Safety of the Rigs," The Guardian, June 11, 1980, p. 13.

103. Clause 5(1) of the Institute War Clauses Builders' Risks attached to the present C.I.C.M. insurance.

include enormous economic loss. Recent events are already indicating that never has the need to insure against such risks been so real. Particular example was the drastic step taken in April 1980 following the catastrophe of the Alexander Kielland and the event of its sister rig ¹⁰⁴ Henrik Ibsen, as a result of which 25 rigs in the Norwegian sector of the North Sea were ordered to be inspected for defects. It was reported that the inspection was planned to take eight weeks and would cost the operators a considerable amount of money. ¹⁰⁵ In the meantime, rigs in production could be taken out of service and production could also be halted. ¹⁰⁶ Another graphic illustration relates to an oil rig which was barred from operating in September 1980 because of its weight limitation. ¹⁰⁷ It can be

104. The Henrik Ibsen, which was to have replaced the Alexander Kielland, was banned by the Norwegian authorities from operating because of defects.

105. The Guardian, April 9, 1980, p. 24.

106. It was the Norske Veritas, the Norwegian ship and rig classification society, that decided on the inspection.

107. As reported in Financial Times, September 20, 1980, p. 2.

reasonably presumed that such decisions were in substance - if not in form - made by the Norwegian government.¹⁰⁸

Loss caused by wear and tear is also excluded. Nevertheless, the exclusion has no necessary connotation that corrosion also comes within the provisions thereof. In this connection, the suggestion has been made that corrosion is a serious problem confronting fixed oil rigs. In 1976, BP discovered that a 20-in diameter hot oil riser on the Forties Alpha Platform had suffered very severe corrosion over a length of 50-60 feet. A large number of investigations were carried out to determine the cause of the corrosion. However, no real satisfactory explanation for the corrosion was found after three years' investigation.¹⁰⁹

108. Immediately after the final report on the Alexander Kielland disaster was published, three oil rigs operating in the British sector of the North Sea (the Pentagone 84, Dixylyn 96 and Dixylyn 97) similar in design to the Alexander Kielland rig were required by the Lloyd's Register of Shipping to undergo modifications in the summer of 1981. See Financial Times, April 7, 1981, p. 2.

109. Potter, "North Sea Oil Industry Still Has A Lot to Learn," Scotland '79, p. iv, in The Scotsman, May 24, 1979. In fact, it has already been

The event shows that in the offshore area there is still scope for technical improvement, in which oil rig insurance has a very clear interest.

6. Costs of re-siting the rig

Wrong location of the platform also comes within the category of undertakings to which the excepted perils apply. In practical terms, the costs of re-siting the rig can be tremendous. By virtue of the
110
Exclusions Clause, the underwriters are not liable for any claim by reason of the insured platform or structure being placed in the wrong location unless the mislocation is caused by an insured peril.

It may be relevant to note that towing out an oil production platform to a correct position in the

recognised that corrosion is the biggest single cause of deterioration in ocean engineering. See Davies, "Protection of Offshore Units - A major Technology," in Financial Times Ltd., Offshore Development (1975) Vol. 2, pp. 152-164, at p. 152. The organisers of the Offshore Inspection, Repair and Maintenance Conference (Ingliston, Edinburgh, 10-12 February 1981) have pointed out that clearing, painting and corrosion control in the North Sea is expected to use up £18.1 million annually over the next few years.

North Sea has been likened to landing a spacecraft on
¹¹¹
 the moon. A new navigational aid applying satellites
 and sensors is now being developed whereby rigs can
¹¹²
 be anchored over the ocean bed with precision. In
 times ahead insurance of such navigational aid would
¹¹³
 surely bring about new problems and challenges.

7. Conventional marine insurance?

It is agreed in the present C.I.C.M. insurance for
 Condeep Statfjord A Platform that the contract of the
 insurance shall be governed by English law, though
 any dispute should be brought before Norwegian courts.
 For reasons already discussed, this contractual
 arrangement would inevitably create a potential source
 of dispute in respect of the applicable law, which

111. Williams, "Satellites and Sensors Aid Search for
 Oil," Financial Times, October 20, 1980, p. 18.

112. Ibid.

For a recent survey, see Banel, "Satellites and
 Sensors Play Critical Role," The Oil Register,
 p. iv, in The Scotsman, February 24, 1981.

113. Insurance of satellites falls within the scope
 of aviation insurance. On problems of insuring
 satellites, see Margo, Aviation Insurance (1980)
 pp. 195-206.

hardly merits re-stating.

With little alternative available, some Norwegian writers have reached a strained assumption, not without suspicion and reluctance, that the contractual commitment refers virtually to the English marine insurance law, at the heart of which lies, of course, the 1906 Marine Insurance Act. This is hardly surprising because the 1906 Act is by far the only piece of legislation that would appear to have possible application. Superficially, the analogy with the 1906 Act has solved some immediate problems. However, there is little to suggest that such an approach has real bearing on solving the genuine issue. Nor does it obviate the necessity of working out an ultimate resolution thereon. Needless to say, it is also of little weight against the fact that there are areas in which discrepancies persist.

As previously indicated, the applicability of the 1906 Act to the insurance of floating rigs has already promoted scepticism, let alone its applicability to

114. Rein, (et al.) op cit (supra note 78) at p. 6-29.

the construction of fixed platforms. Although the present C.I.C.M. policy retains some features of marine insurance, the essential basis for full applicability is largely absent. In consequence, controversy is expected to be forthcoming.

The magnitude of the problem does provide justification for an immediate review of the present legal framework as regards oil rig insurance, on which the interest of both the British government and the London market converges. With the effects of oil rig insurance already pervading offshore production and developments, there is scarcely any margin for delay in beginning to introduce a programme of law reform. From the foregoing account, it may be concluded that oil rig insurance is not incompatible with marine insurance, but it transcends marine insurance concepts. That is the direction in which the reform should move.

115. Section 2 of the Marine Insurance Act 1906 has the effect that a contract of marine insurance may also cover a ship in the course of building. In James Yachts Ltd. v. Thames and Mersey Marine Insurance Co. Ltd., [1977] 1 Lloyd's Rep. 206, the plaintiff (insured) argued that a policy covering the construction of a boat was not a marine insurance policy.

CHAPTER SIX

AN INSURANCE APPROACH TO OFFSHORE OIL POLLUTION

A. Offshore pollution insurance: an introduction1. Pollution hazards

On January 28, 1969, a blowout took place at tract 402 in the Santa Barbara Channel off California, resulting in a slick that grew to 800 square miles. The estimated damage from the oil spill ran into tens of millions of dollars.¹ Among the representative examples of offshore pollution hazards following Santa Barbara, the blowouts of Bravo and Ixtoc I also²

1. For legal approaches to the incident, see Baldwin, "The Santa Barbara Oil Spill," (1970) 42 University of Colorado Law Review 33; Nanda and Stiles, "Off-shore oil Spills: An Evaluation of Recent United States Responses," (1970) 7 San Diego Law Review 519, at pp. 526-534; Salmsley, "Oil Pollution Problems Arising Out of the Continental Shelf : the Santa Barbara Disaster," (1972) 9 San Diego Law Review 514. In a case growing out of the Santa Barbara oil spill, the court held that oil companies were under a duty to fishermen to conduct their offshore drilling and production in a reasonably prudent manner so as to avoid negligent diminution of aquatic life, thus allowing fishermen to recover damages for economic loss: Union Oil Co. v. Oppen, 501 F.2d 558 (1974).

2. See above, p. 210.

caused much legal interest and press comment throughout the world. The blowout off the coast of Nigeria in 1980³ marked a recent indication of the devastating pollution damage resulting from offshore oil activities, which usually involves huge amount of damages and cleanup costs.

In general, there are four major sources from which oil pollution can occur: seabed exploration and exploitation, land-based pollution, vessel-source pollution, and ocean dumping. The present study, which chiefly concerns the first sources, is an insurance approach to the subject with a review of some relevant international conventions and agreements. The insurance coverages currently in use as against the risk are also to be observed.

It should be realised that blowouts like Santa Barbara are not the only source of oil pollution arising from offshore operations. Accidental spills

3. The blowout occurred at a well one mile off the port of Sangana, in the Rivers State about 400 miles east of Lagos, as reported by The Times, March 3, 1980, p. 7.

from oil wells, drilling and production facilities⁴ can also generate enormous claims and compensations. All this underlines the importance of framing appropriate insurance programmes, which merit thorough legal consideration.

2. Operators' liability

It should be pointed out at the outset that off-shore pollution liability falls within the category of third party liability, which may be imposed under⁵ statutory law or common law, or both. The nature of

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4. There are seven main types of accidents which have been recognised as possible sources of offshore oil pollution. For details see North Sea Oil and the Environment - Pollution: An Assessment of the Risks and Action to Deal with Incidents, a paper published by the Scottish Office at the request of the Oil Development Council for Scotland, at pp. 3-5.
 5. One writer takes the position that there will be no grounds for an action based on negligence, nor will the strict liability of Rylands v. Fletcher apply. See McLoughlin, The Law and Practice Relating to Pollution Control in the United Kingdom (1976) at p. 176. Note however Henderson (et al.), Oil and Gas Law: The North Sea Exploitation (1979) at p. 1.1033. As to the applicability of Rylands v. Fletcher to vessel-source pollution, see Ingram, "Oil Pollution - Rylands v. Fletcher," (1971) 121 New Law Journal 183.

such liability, to which some articles have devoted,⁶ is not discussed in this Chapter. It is also beyond the ambit of this work to generalise about the occasions on which compensation is likely to be claimed.

Of paramount importance in establishing the legal relationship between operators and drilling contractors for purposes of pollution liability are drilling contracts, in which responsibility for costs or expenses in respect thereof should be clearly defined. In practice the view prevails that the major portion of the responsibility is imposed upon the operator. One of the most revealing pieces of evidence lies⁷ in clause 1005(b) of the I.A.D.C. contract. Although

6. See, e.g. Dubais, "Compensation for Oil Pollution Damage Resulting from Exploration and Exploitation of Hydrocarbons in the Seabed," (1975) 6 Journal of Maritime Law & Commerce 549. For the Norwegian jurisdiction, see Levandowski, "Civil Liability for Oil-Pollution Damage on the Norwegian Continental Shelf," (1978) 5 Ocean Development and International Law Journal 397.

7. Clause 1005(b) of the I.A.D.C. contract provides:
 "Operator shall assume all responsibility for (including control and removal of the pollutant involved) and shall protect, defend and save the Contractor harmless from and against all claims,

the drilling contractor under the contract should still assume responsibility for cleaning up and containing pollution or contamination which originates above the surface of the water from spills of fuels, lubricants and so on,⁸ such responsibility is relatively insignificant.

The dominant approach whereby the operator should assume substantial responsibility for oil pollution has been echoed by the Offshore Pollution Liability Agreement (OPOL),⁹ under which the operating oil companies agree to accept strict liability for such hazards. This has been further strengthened following the Convention on Civil Liability for Oil Pollution

demands, and causes of action of every kind and character arising from all pollution or contamination, other than that described in subclause (a) above, which may occur from the negligence of Contractor or otherwise during the term of this Contract or as a result of operations hereunder, including but not limited to, that which may result from fire, blowout, cratering, seepage or any other uncontrolled flow of oil, gas, water or other substance, as well as the use or"

8. Clause 1005(a) of the contract.

9. See below, p. 293.

Damage Resulting from Exploration and Exploitation of
¹⁰
 Seabed Mineral Resources 1976, according to which the
 liability falls - subject to certain exceptions - on
 the operator. As is noted below, the operator should
 also maintain pollution insurance or produce other evi-
 dence of its financial ability to cover the risk.

Despite the foregoing, it remains true that parties
 other than the operator are not exempted from being
 sued. One example may be given of the claims as a
 result of the Ixtoc I blowout. Instead of seeking
 financial compensation for damages from the two
 Mexican companies involved in the oil field, the US
 Justice Department decided to restrict its litigation
 for a modest \$ million damages to Sedoc, an American
 drilling firm which leased Mexico the oil rig used at
¹¹
 the site of the blowout. It is fairly clear that
 political reasons were taken into consideration in
¹²
 reaching the decision.

10. See below, p. 299.

11. The Guardian, October 24, 1979, p. 7; The Times,
 November 16, 1979, p. 8.

12. It has been reported that in the midst of the furor

3. A separate coverage

It should be observed that offshore pollution liability is not covered under the liability or property policies previously discussed,¹³ with the very limited exceptions of the C.I.C.M. insurance.¹⁴ Therefore, it is virtually through a separate coverage that the risk can be insured against. This would inevitably leave the parties with less flexibility over the implementation of their insurance schemes.

over compensation for damages caused by the blowout, the two governments reached a new agreement on the sale of Mexican natural gas to the United States. As reported by The Times, November 16, 1979, p. 8.

13. This can be evidenced by, among others, section 17(a) of the new Norwegian P & I conditions specially designed for floating drilling rigs; see also clause 8(h) of the London Standard Drilling Barge Form.
14. It is however confined to damage to a production platform in order to prevent or reduce a pollution hazard. The loss or damage must have been caused by actions of a sovereign power. See clause 9 of the written policy.

It must also be added that increasing public and government concern is being focused on oil pollution, which is a strong pointer to the compulsory nature of the insurance.

Another salient feature of offshore pollution insurance is the fact that pollution hazards always involve potentially sizable losses, which necessitates joint efforts to effect internal insurance arrangements among oil companies. In this domain, the role the Oil Insurance Limited (O.I.L.)¹⁵ plays is a practical illustration. On the other hand, progressive steps have been taken at the international level towards an equitable solution of the pollution problem. The influence exerted by such measures upon pollution insurance is of considerable significance.

B. A conceptual classification of oil pollution coverages

1. Effecting the insurance: some introductory remarks

As has been pointed out, the basic concern in this work is with the risk of oil pollution caused by offshore exploration and exploitation, which must not be

15. See below, p. 296.

confused by that of vessel-source pollution, e.g. an accidental spill from an oil tanker. It should be indicated that the legal régime of the latter case has been largely established, and a considerable amount of literature exists on the topic.¹⁶ It may probably be asserted that the devastating pollution effects originating from the two different sources are identical. On legal reparation, however, they are far apart. And it is exactly this distinction that has proved to be of vital importance in effecting pollution. In considering this facet of the problem, reference to the following international conventions and agreements is required.

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16. E.g. Keeton, "The Lessons of the Torrey Canyon: English Law Aspects," (1968) 21 Current Legal Problems 94; Lowry, "Shipowner and Oil Pollution Liability," (1972) 18 McGill Law Journal 577; Dinstein, "Oil Pollution by Ships and Freedom of the High Seas," (1972) 3 Journal of Maritime Law 363; Forster, "Civil Liability of Shipowners for Oil Pollution," (1973) Journal of Business Law 23; Sandbrook and Yurchyshyn, "Marine Pollution from Vessels," in Stein, (ed.), Critical Environmental Issues on the Law of the Sea, a Report of the International Institute for Environment and Development, London (1975) pp. 19-30.

2. The Geneva Convention on the High Seas 1958¹⁷

Article 24 of the Convention states:

"Every state shall draw up regulations to prevent pollution of the seas by the discharge of oil from ships or pipelines or resulting from the exploitation and exploration of the seabed and its subsoil, taking account of existing treaty provisions on the subject."

It is reasonably clear that the "regulations" referred to above are potentially of very wide application. Specifically, they are meant to cover both vessel-source pollution and pollution arising from offshore oil activities.

In this connection, mention must also be made of the Convention on the Continental Shelf 1958,¹⁸ which seems to have paid no specific attention to oil pollution.¹⁹

17. 52 AJIL 842.

18. 52 AJIL 858.

19. However, Article 5.1 provides:

"The exploration of the continental shelf and the exploitation of its natural resources must not result in any unjustifiable interference with navigation, fishing or the conservation of the living resources of the sea, nor result in any

3. The International Convention Relating to Inter-
vention on the High Seas in Cases of Oil Pollution
Casualties 1969

20

The Convention, also known as the Intervention

21

Convention, provides:

"Parties to the present Convention may take such measures on the high seas as may be necessary to prevent, mitigate or eliminate grave and imminent danger to their coastline or related interests from pollution or threat of pollution of the sea by oil, following upon a maritime casualty or acts related to such a casualty, which may reasonably be expected to result in major harmful consequences."
 (Emphasis added)

As used in the Convention, "maritime casualty" means
 "a collision of ships, stranding or other accident of navigation, or other occurrence on board a ship or external to it resulting in material damage to imminent threat of material damage to a ship or cargo."
 22

interference with fundamental oceanographic or other scientific research carried out with the intention of open publication."

20. 9 ILM 25 (1970).

21. Article 1.1.

22. Article 2.1.

The definition of "ship" is to be found in Article 2.2, which stipulates:

"'Ship' means:

- (a) any sea-going vessel of any type whatsoever,
and
- (b) any floating craft, with the exception of an installation or device engaged in the exploration and exploitation of the resources of the sea-bed and the ocean floor and the subsoil thereof."

It is manifest that oil pollution resulting from off-shore ventures does not come within the category of undertakings to which the Convention applies.

4. The International Convention for the Prevention of Pollution from Ships 1973

23

The Convention includes a reference to the word "discharge", which means "any release howsoever caused from a ship and includes any escape, disposal, spilling, leaking, pumping, emitting or emptying."²⁴

In this context, "ship" denotes "a vessel of any type whatsoever operating in the marine environment and includes hydrofoil boats, air-cushion vehicles, submersibles, floating craft and fixed or floating platforms." However, this should be read in

23. 12 ILM 1319 (1973).

24. Article 2(3)(a).

conjunction with Article 2(3)(b)(ii), whereby "discharge" does not include release of harmful substances "directly arising from the exploration, exploitation and associated off-shore processing of sea-bed mineral resources."

In the light of the foregoing, the Convention only applies to offshore floating rigs in respect of discharges not resulting directly from the exploration or exploitation of seabed mineral resources.

5. The Convention for the Prevention of Marine Pollution by Dumping from Ships and Aircraft 1972²⁵

According to Article 19.1, "dumping" refers to any deliberate disposal of substances and materials into the sea by or from ships or aircraft. Article 19.2 provides:

"'Ship and aircraft' means sea-going vessels and air-borne craft of any type whatsoever. This expression includes air-cushion aircraft, floating craft whether self-propelled or not, and fixed or floating platforms."

There is a necessary implication that offshore oil rigs of whatever type should fall within the provisions of this Article.

25. 11 ILM 262 (1972).

6. The Convention on the Prevention of Marine Pollution by Dumping of Wastes and other Matter 1972²⁶

By virtue of Article III(1)(a) of the Convention, "dumping" means:

- "(i) any deliberate disposal at sea of wastes or matter from vessels, aircraft, platforms, or other man-made structures at sea;
- (ii) any deliberate disposal at sea of vessels, aircraft, platforms or other man-made structures at sea."

Article III(2) has the effect that vessels and aircraft includes "air-cushion craft and floating craft, whether self-propelled or not."

That offshore oil rigs fall within the scope of the Convention is clear from the consideration of these provisions. The definitions present no difficulties.

7. The Agreement Concerning Pollution of the North Sea by Oil 1969²⁷

²⁸
The Agreement applies "whenever the presence or

26. 11 ILM 1294 (1972).

27. 9 ILM 359 (1970).

28. This Agreement is a regional scheme of co-operation among the following North Sea States: Belgium,

the prospective presence of oil polluting the sea within the North Sea area...presents a grave and imminent danger to the coast or related interests of one or more Contracting Parties."

29

Article 5.1, which calls for particular consideration, states:

"Whenever a Contracting Party is aware of a casualty or the presence of oil slicks in the North Sea area likely to constitute a serious threat to the coast or related interests of any other Contracting Party, it shall inform that other Party without delay through its competent authority." (Emphasis added)

In the absence of a plain definition of "oil slicks", there may be argument as to whether such slicks necessarily cover oil spills of whatever source.

30

It is submitted that the ambiguity - whether deliberately engineered or not - may be attributable to the following factors.

First, there are instances in which sources of

Denmark, France, Federal Republic of Germany, the Netherlands, Norway, Sweden and the U.K.

29. Article 1.

30. Cf. Fitzmaurice, "A Critical Assessment of Pollution Control Laws Regulating the Development of Petroleum

oil spills are unknown or difficult to identify. One recent example involved the oil pollution along the Swedish west coast and in part of the Oslofjord in Norway in early January, 1981. Neither the Norwegian nor Swedish authorities were able to locate the source of the pollution.³¹ On January 6, 1981, Swedish coastguards abandoned the search for the oil slick, which had killed hundreds of thousands of seabirds.³²

Second, the principal purpose of the Agreement is to achieve active co-operation between the Contracting States in minimising pollution damage. To that extent, it is of little practical significance in treating with difference oil slicks which are of different sources, even if they are identifiable.

Resources in the United Kingdom and Norwegian Sectors of the North Sea," PhD thesis, University of Edinburgh, 1977, at p. 218.

31. The Guardian, January 5, 1981, p. 6.

32. The Times, January 6, 1981, p. 4. It was reported on BBC radio news on January 15, 1981, that the slick had been from a Greek tanker. This was not confirmed by newspapers reports.
In this connection, it should be further indicated that the difficulty in identifying the sources of

From the foregoing observations it may therefore be concluded that oil pollution, being of different sources, is considered a single subject or category by some, but not all, international conventions or

³³ agreements. The thought behind the 1969 Agreement may help to explain why these conventions or agreements have adopted such an approach. It can be inferred that the nature of these conventions or agreements does not necessitate the distinction between oil pollution of different sources; or that the distinction would be inadvisable in implementing the conventions or agreements, as the 1969 Agreement ³⁴ has shown. At any rate, this lack of uniformity seems

oil spills also applies to the case of an oil fire. For a recent decision illustrative of this point, see The "Arzew", [1981] 1 Lloyd's Rep. 142.

33. As far as this proposition is concerned, it would seem unnecessary to extend the present discussion to many other international conventions and agreements relating to oil pollution.
34. The approach bringing vessel-source and seabed-source pollution within one legal machinery can also be found in municipal law. See in particular the Prevention of Pollution Act 1971. In summary, if oil is discharged from a ship, the owner or

to have left the distinction with less significance than it should ordinarily have. It is natural that some confusion may have been created. It should be reiterated, however, that the fact that some international conventions or agreements do not distinguish the sources of oil pollution does not lead to the assumption that there should be a single legal framework within which oil pollution is regulated as far as compensation and remedial measures are concerned.³⁵ As will be further demonstrated, the implications of

master of the ship shall, subject to the provisions of the Act, be guilty of an offence. See section 1(b). If the discharge results from the exploration or exploitation of seabed resources, the person carrying on the operations shall be guilty of an offence. See section 3(1) of the Act. However, it should be observed that the Act makes no reference to civil liability.

35. It should however be pointed out that there are differing views on this point. See, for example, Dubais, op cit (supra note 6) at p1 553. Nevertheless, it is not proposed to discuss in the present work the feasibility and advisability of such a possible single framework.

this distinction upon pollution insurance are extremely far-reaching, on which the international conventions and agreements to be noted below may shed some light.

8. The International Convention on Civil Liability for Oil Pollution Damage 1969

36

The Convention was concluded with the aim of adopting limits of liability for discharges of oil from ships, which represent an increase in the limits of the 1957 Brussels Convention on the Limitation of Shipowners' Liability.

What constitutes "pollution damage" is set out in Article I.6, which provides:

"'Pollution damage' means loss or damage caused outside the ship carrying oil by contamination resulting from the escape or discharge of oil from the ship, whenever such escape or discharge may occur, and includes the costs of preventive measures and further loss or damage caused by preventive measures."

Article I.1 defines "ship" as "any sea-going vessel and any seaborne craft of any type whatsoever, actually carrying oil in bulk as cargo."

This is a conclusive intimation that oil pollution

arising from exploration and exploitation of mineral resources in the offshore area is meant to be excluded. However, difficulty may be encountered in this context as regards the SWOPS, BP's proposed new production³⁷ system, which raises the immediate question as to whether such tankers fall within the purview of the provisions. It would seem that the decisive test lies in whether they are carrying oil in bulk as cargo.

The limitation of liability contained in the Convention does not remove the overwhelming desirability of pollution insurance, to which some consideration³⁸ should be given. The Convention further provides:

"The owner of a ship registered in a Contracting State and carrying more than 2,000 tons of oil in bulk as cargo shall be required to maintain insurance or other financial security, such as the guarantee of a bank or a certificate delivered by an international compensation fund, in the sums fixed by applying the limits of liability prescribed in Article V, paragraph 1 to cover his liability for pollution damage under this Convention."

In addition, part of Article VII.2 reads as follows:

"A certificate attesting that insurance or other financial security is in force in accordance with

37. See above, p. 151.

38. Article VII.1.

the provisions of this Convention shall be issued to each ship..."

There are other provisions to which the structures of the insurance or other financial security are
 39
 subject.

Account must also be taken of the International Convention on the Establishment of an International
 40
 Fund for Oil Pollution Damage, of which the primary purpose is to complement the Civil Liability Convention.

9. Tanker Owners' Voluntary Agreement Concerning Liability for Oil Pollution (TOVALOP) and its insurance affiliate

39. See Article VII.5.

The Merchant Shipping (Oil Pollution) Act 1971 gives effect to the 1969 Brussels Convention. The provisions dealing with compulsory insurance are contained in sections 10-12.

The Oil Pollution (Compulsory Insurance) Regulations 1977, S.I. 1977 No. 85, made under ss. 10(1),(4) and 11(3) of the 1971 Act, consolidate and amend the Oil Pollution (Compulsory Insurance) Regulations 1975, S.I. 1975 No. 869, and the amending S.I. 1975, Nos. 1234, 1759 and 2002 and S.I. 1976 Nos. 154, 857, 1177 and 1440. These regulations were amended as from 12 April 1977 by S.I. 1977 No. 497 and as from 2 January 1980 by S.I. 1979 No. 1593.

40. 11 ILM 284 (1972).

The core of the Agreement is to provide a source of recovery for national governments having expended money in removing oil caused by the negligent discharge of a participating tanker. However, the reimbursement is directed at a government's cleanup expense only.

It is important to note that pollution insurance has been heavily involved in the implementation of TOVALOP. In this connection, account must be taken of the International Tanker Indemnity Association, Ltd. (I.T.I.A.), TOVALOP's insurance affiliate with which the participating tanker owners carry oil pollution insurance. When a claim arises from a negligent discharge, liability is channelled to the participating tanker owner and I.T.I.A. The tanker owner is able to recover from I.T.I.A. for the expenses in removing any discharged oil.

It should be indicated that insurance coverages against tanker pollution are in general not looked upon favourably by the insurance industry. However,

41. 8 ILM 497 (1969).

42. Comment, "Compensation for Oil Pollution at Sea: An Insurance Approach," (1975) 12 San Diego Law Review 729-731.

it is still possible to obtain marine liability policies to cover the risk, one vehicle being an oil pollution endorsement to a P & I policy. When, as is frequently the case, the tanker owner is under double insurance of both the P & I coverage and I.T.I.A., the latter should be the primary insurer.

TOVALOP, together with the Contract Regarding an Interim Supplement to Tanker Liability for Oil Pollution⁴³ (CRISTAL), has marked a joint effort on the part of tanker owners and oil companies to deal with the problem of tanker pollution, about which much has been written. As is observed below, the insurance coverages involved therein are by no means comparable to those in respect of pollution liability arising from offshore oil operations.

C. Some aspects of Offshore Pollution Liability
⁴⁴
Agreement (OPOL)

1. Generally

As tanker owners are in principle responsible for

43. 10 ILM 137 (1971).

44. 13 ILM 1409 (1974). This Agreement has been amended on several occasions.

tanker pollution, so are operators for pollution damage resulting from offshore oil operations. In 1974, an initiative was taken by the oil industry to ensure that possible pollution claims arising therefrom were met. This led to OPOL, which is essentially a private agreement under which operators, as between themselves, agree to accept strict liability up to a maximum of \$25 million per incident for pollution damage and the cost of remedial measures in the event of a spillage or escape of oil. Initially, OPOL was drafted to apply to the operators of offshore facilities within the United Kingdom jurisdiction, and was subsequently extended to Denmark, France, the Federal Republic of Germany, Ireland, the Netherlands, and Norway. A professional organisation entitled the Offshore Pollution Liability Association Ltd. has been formed in London to administer the Agreement.

2. "Offshore facility"

As used in the Agreement, the term "offshore
 45
 facility" means:

"A. any well and any installation or portion thereof
 of any kind, fixed or mobile, used for the

purpose of exploring for, producing, treating or transporting crude oil from the seabed or its subsoil; and

- B. any well used for the purpose of exploring for or recovering gas or natural gas liquids from the seabed or its subsoil during the period that any such well is being drilled (except for normal work-over operations);

which is located within the jurisdiction of a Designated State to the extent that it is to seaward of the low-water line along the coast as marked on large scale charts officially recognized by the Government of such Designated State;

Provided however that none of the following shall be considered an Offshore Facility: -

- (i) any abandoned well, or
- (ii) any ship, barge or other craft not being used for the storage of crude oil, commencing at the loading manifold thereof."

The definition is not without problems. It is not free
 46
 from doubt whether the SWOPS should be considered an Offshore Facility.

The importance of the definition may also be gauged by the fact that in case of default by one of its members each of the remaining parties should pay its share of any claims for which the Association has guaranteed to pay, the contribution being calculated on a mutual basis in proportion to the number of

46. See above, p. 290.

offshore facilities which the remaining parties are
⁴⁷
operating.

3. OPOL and insurance

Each party to OPOL is obligated to establish and maintain its "financial responsibility" to ensure that it has the ability to meet the claims. The devices by which the obligation can be fulfilled are not specified in the Agreement itself. It is however evident from the Rules for Establishment of Financial Responsibility that the production of evidence of insurance, self-insurance, or other means satisfactory to the Association will suffice.

Unlike TOVALOP, OPOL provides no insurance affiliates to the participating parties for insurance purposes. As will be further discussed, such coverages can be obtained in the insurance market, subject of course to the capacity being available. The parties can also resort to the insurance afforded by the O.I.L. under certain
⁴⁸
circumstances.

Whatever the coverages may be, the operator must

47. By virtue of Clause II.C(4).

48. See below, p. 297.

produce a certificate of the insurance, issued by an insurance company or an insurance broker or agent acceptable to the Association, and in a form specified by the administering company.⁴⁹ Conceivably, the certificate should be worded in a manner which clearly states, among other details, that the insurance policy covers the operator's liability for claims under OPOL.

In the case of an O.I.L. insurance, the operator's obligation under OPOL can be covered by means of an OPOL Endorsement to the O.I.L. policy, part of which reads as follows:

"Notwithstanding any other provision of this policy but subject to the applicable annual aggregate and deductible provisions....., the Underwriter agrees to indemnify or pay on behalf of the named insured any sum or sums the insured is required, directly or indirectly, to pay pursuant to the provisions of the Offshore Pollution Liability Agreement or the Articles of Association of the Offshore Pollution Liability Association Limited as such are in effect from time to time...."

In choosing between insurance and self-insurance, the operator would surely assess the likely consequences.

49. See Rule (1) of the Rules for Establishment of Financial Responsibility. 14 ILM 152 (1975).

There are provisions requiring a self-insurer to demonstrate financial capability by providing its latest audited financial statement.⁵⁰ To be qualified to be a self-insurer, the operator has to meet a number of other criteria. These other criteria are largely of a specialised nature, with which the present study does not intend to deal in detail.

To some extent, OPOL is similar in concept to TOVALOP. From the standpoint of insurance, however, they represent two entirely different bases, upon which two incommensurable insurance frameworks have been built up. Added to the complexity of the situation has been the novelty of offshore technology, which has posed a threat to the application of the two voluntary agreements. As a corollary, the insurance position can be left in doubt and uncertainty. Above all, this substantial point would appear to present continuing difficulties, to which the agreements as well as the underwriters' ability must be constantly adjusted to adapt.

50. Rule (4).

D. Insurance considerations of the Convention on Civil Liability for Oil Pollution Damage Resulting from Exploration and Exploitation of Seabed Mineral Resources 1976

1. Operators' strict liability

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The Convention, which was done at London in 1976, will enter into force on the ninetieth day following the date of deposit of the fourth instrument of rati-

52

fication, acceptance, approval or accession.

Functionally, the Convention has characteristics similar to the Brussels Civil Liability Convention 1969. As previously noted, this Convention places strict liability on the operator. Article 3.1 provides:

"Except as provided in paragraphs 3, 4, and 5 of this Article, the operator of the installation at the time of an incident shall be liable for any pollution damage resulting from the incident. When the incident consists of a series of occurrences, liability for pollution damage arising out of each occurrence shall attach to the operator of the installations at the time of that occurrence."

As defined, the operator means "the person, whether licensee or not, designated as operator for the purposes of this Convention by the Controlling State, or, in the

51. 16 ILM 1450 (1977).

52. Article 20.1.

absence of such designation, the person who is in overall control of the activities carried on at the installation.⁵³"

The definition of the installation referred to above is fairly broad. By Article 1, an installation means, among others, "any well or other facility, whether fixed or mobile, which is used for the purpose of exploring for, producing, treating, storing, transmitting or regaining control of the flow of crude oil from the seabed or its subsoil." It is easy to see that a ship as defined in the 1969 Brussels Convention should not be considered to be an installation in this context.

A particularly noteworthy point is that the Convention applies not only to pollution damage, but also to preventive measures wherever taken to prevent or minimise such pollution damage.⁵⁴

Although there are situations in which the operator can be exempted from its liability,⁵⁵ the potential for

53. Article 1.3.

54. See Article 2.

55. Articles 3.3, 3.4, and 3.5.

an extremely heavy burden on the operator is still evident. The answer to this must surely lie in the limitation of liability adopted by the Convention, which will be further discussed below.

2. Compulsory insurance

Underlying the whole fabric of the Convention is the idea of compulsory insurance. Article 8.1 states:

"To cover his liability under this Convention, the operator shall be required to have and maintain insurance or other financial security to such amount, of such type and on such terms as the Controlling State shall specify, provided that that amount shall not be less than 22 million Special Drawing Rights until five years have elapsed from the date on which this Convention is opened for signature and not less than 35 million Special Drawing Rights thereafter. However the Controlling State may exempt the operator wholly or in part from the requirement to have and maintain such insurance or other financial security to cover his liability for pollution damage wholly caused by an act of sabotage or terrorism."

As far as compulsory insurance is concerned, the Convention retains some features of the 1969 Brussels Convention. Nevertheless, the tanker owner under the 1969 Convention is required to maintain insurance or other financial security in the sums fixed for determination of the limitation of liability. By contrast, what has been set in the present Convention

is a minimum requirement as quoted above, which may⁵⁶ be amended pursuant to appropriate procedures. In consequence, the actual amounts can be above the minimum, which would make uniformity unattainable. Equally controversial has been the power of the Controlling State to specify the type and terms of the insurance, which has a marked effect on oil companies in implementing their insurance programmes. Conceivably, the restrictions upon operators in effecting pollution insurance may differ in detail from one Controlling State to another. This raises the presumption that an insurance policy, however designed, might not be acceptable to the Controlling State. All these lend support to the view already expressed by an author that offshore operators might⁵⁷ well be subjected to unreasonable and costly obligations. To these worries has been added the fact that competition in the insurance industry can also be impeded.

56. See below, p. 306.

57. Dubais, "The 1976 Convention on Civil Liability for Oil Pollution Damage from Offshore Operations," (1977-78) 9 Journal of Maritime Law & Commerce 61, at p. 67.

Article 8.2, which also concerns the structures
 58
 of the compulsory insurance, seems to have presented
 little difficulty. Where the operator is a State
 Party, Article 8.5 has the effect that the operator
 shall not be required to maintain insurance or other
 financial security to cover its liability. This is not
 in the interest of justice.

The foregoing observation does not alter the fact
 that compulsory insurance is essential to pollution
 liability. Nonetheless, the approach adopted by the
 present Convention to the compulsory insurance appears
 to be without apparent justification.

3. Limitation of liability and insurance

Limitation of liability is a vital ingredient of
 the Convention. It has raised some issues which are

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58. "An insurance or other financial security shall not satisfy the requirements of this Article if it can cease, for reasons other than the expiry of the period of validity of the insurance or security, before two months have elapsed from the date on which notice of its termination is given to the competent public authority of the Controlling State. The foregoing provision shall similarly apply to any modification which results in the insurance or security no longer satisfying the requirements of this Article."

worthy of note. Article 6.1 provides:

"The operator shall be entitled to limit his liability under this Convention for each installation and each incident to the amount of 30 million Special Drawing Rights until five years have elapsed from the date on which the Convention is opened for signature and to the amount of 40 million Special Drawing Rights thereafter."

In arriving at the amounts set out above, the drafters of the Convention agreed to relate the limitation to the international insurance market. However, views varied widely on the level of the insurance coverage then available. It has been suggested that the figures set in Article 6.1 were out of line with the availabilities on the insurance market for the risk.⁵⁹

What is more open to question is the fact that the amounts to which the operator is entitled to limit his liability are higher than the minimum requirement set in Article 8.1 regulating the compulsory insurance. This is largely due to the strong attitude taken by the Norwegian delegation, the underlying theory being that an entrepreneur who undertakes to carry out a dangerous activity for profit should be held liable for the adverse

59. Dubais, op cit (supra note 57) at p. 67.

consequences beyond and above the guarantee offered
⁶⁰
 by his underwriters. There is room for debate as to
 whether this reasoning is realistic from a practical
 standpoint.

A further complexity concerns the question of
 constituting a fund for the purpose of availing the
 operator of the benefit of limitation. It is required
 by the Convention that the operator shall "constitute
 a fund for the total sum representing the limit of
 his liability with the court or other competent
 authority of any one of the States Parties in which
⁶¹
 action is brought under Article 11."

The details of constituting the fund are specified
⁶²
 in the Convention as follows:

"A fund constituted by one of the operators
 mentioned in paragraph 2 of Article 3 shall be
 deemed to be constituted by all of them. The fund
 can be constituted either by depositing the sum or
 by producing a bank guarantee or other guarantee,
 accepting under the legislation of the State Party
 where the fund is constituted, and considered to be
 adequate by the court or other competent authority."

60. Better known as the "industrial risk" theory.

61. Article 6.5.

62. Ibid.

It is difficult to deduce whether an insurance certificate suffices to meet the requirements of the "other guarantee". If the answer is affirmative, can the operator become automatically entitled to limitation of liability provided that the amounts of its compulsory insurance are as high as those specified in Article 6.1? This seems to be a moot point as to which some confusion might be expected to follow.

Further problems arise when amendments are made to the amounts set out in the Convention. At this point it is appropriate to consider the function of the Committee established under Article 9.1. The Committee, composed of a representative of each State Party, may recommend to the States Parties an amendment to any of the amounts if representatives of at least three-quarters of the States Parties to the Convention vote in favour of such a recommendation. Amongst
63
factors which should be taken into account in making such a recommendation, the availability of reliable insurance cover is of particular significance. A

63. As specified in Article 9.2.

literal reading of Article 9 would suggest that the possibility of reducing the amounts for determination of limitation of liability to being consistent with the minimum requirement set for the compulsory insurance is very real. In consequence, this can have the effect of removing the disparity in level between limitation of liability and the compulsory insurance.

4. Direct action against the insurer

The notion of direct action crystallized in the present Convention is not without precedent in Scottish⁶⁴ law. Nevertheless, it represents a departure from the English common law principle of privity of contract whereby only parties to the contract are permitted to sue upon it. In the United States, various direct action statutes have been enacted, which differ in⁶⁵ terms and effects. The essential basis of direct action

64. In Scottish private law, there are exceptions to the general rule that a contract only creates rights and liabilities between the parties to it. For example, a contract between two parties may be held in appropriate cases to confer a jus quaesitum tertio on a third party. See Gloag on Contract (2nd ed. 1929) pp. 234-247; Walker, Principles of Scottish Private Law (1970) pp. 567-569.

65. The Louisiana direct action statute is the most celebrated one; it has been the topic of numerous legal articles.

against the insurer is the belief that liability insurance is for the benefit of the suffering third parties rather than for the protection of the insureds. Be that as it may, the existence of such statutes has been a subject of controversy for many years in the United States jurisdiction.

It is important to note that in the United States jurisdiction policies of liability insurance can be subdivided into two categories according to the nature of the insurance, i.e. contracts of liability and contracts of indemnity.⁶⁶ In the case of a contract of liability, the amount recoverable is not measured by the extent of the insureds' loss, and is payable⁶⁷ whenever the specified event happens.

Unlike a contract of liability, a contract of

66. 44 Corpus Juris Secundum 481, 482.

Nevertheless, such a subdivision does not exist in the UK jurisdiction. In British Cash and Parcel Conveyors Ltd. v. Lamson Store Co. Ltd., [1908] 1 K.B. 1006, Fletcher Moulton L.J. stated that a contract of liability insurance was a contract of indemnity. This has become the established principle. See 25 Halsbury's Laws of England (4th ed.) 350.

67. It would seem that such an insurance should fall within the scope of contingency insurance in the UK jurisdiction.

indemnity is solely for the benefit of the insured in that it reimburses the insured for the claims in respect of his liability. Specifically, the happening of the event does not of itself entitle the insured to payment of the sum stipulated in the policy; the event must in fact result in a pecuniary loss to the assured who then becomes entitled to be indemnified by the insurer. In other words, the assured cannot recover more than what he establishes to be the actual amount of his loss.

One of the most controversial aspects of direct action concerns the legal confrontation between contracts of liability and contracts of indemnity. That they should be treated separately in applying direct action rules is still the mainstream position in the United States. Whether a direct action can be brought against the underwriter of a contract of indemnity depends upon the respective statutes and the case law. This has in turn become a fruitful source of litigation.⁶⁸

68. The decisions include Maryland Casualty Co. v. Cushing, 347 U.S. 409 (1954); Wilburn Boat Co. v. Fireman's Fund Ins. Co., 348 U.S. 310 (1955); and the subsequent cases. The Cushing case also involved

Against this background, it would seem that the present Convention may have given cause for concern.

Article 8.3 provides:

"Any claim for compensation for pollution damage may be brought directly against the insurer or other person providing financial security for the operator's liability for pollution damage. In such case the liability of the defendant shall be limited to the amount specified in accordance with paragraph 1 of this Article irrespective of the fact that the pollution damage occurred as a result of an act or omission by the operator himself, done deliberately with actual knowledge that pollution damage would result. The defendant may further avail himself of the defences, other than the bankruptcy or winding-up of the operator, which the operator himself would have been entitled to invoke. Furthermore, the defendant may avail himself of the defence that the pollution damage resulted from the wilful misconduct of the operator himself, but the defendant may not avail himself of any other defence which he might have been entitled to invoke in proceedings brought by the operator against him. The defendant shall in any event have the right to require the operator to be joined in the proceedings."

Some points do deserve critical examination. The first question to ask is whether the present Article applies to contracts of indemnity without any qualification. Bearing in mind that each Controlling State has the power

the issue of limitation of liability, which has been noted in Chapter 4. See above, p. 155.

to specify the type and terms of the insurance,⁶⁹
 there is every likelihood that some - if not all -
 Controlling States would favour the form of a
 contract of indemnity.⁷⁰ In that case, does the
 foregoing analysis permit an automatic presumption
 that such a contract necessarily come within the
 provisions of the Article? Is the Controlling
 States's power to specify the type and terms of
 the insurance sufficient to override the direct
 action rule? It is submitted that these are
 substantial points which cannot be ignored. A
 number of United States decisions are evidence⁷¹
 that legal questions are bound to arise in this
 connection, of which the originators of the
 Convention seem to have taken little account.

According to the present Article, the liability

69. Article 8.1 of the Convention.

70. In the following section, an attempt is made to discuss in general terms the seepage, pollution and contamination insurance policy which is now widely in use. The policy is a typical contract of indemnity.

71. Supra note 68.

of the insurer shall be limited to the amount in accordance with Article 8.1. There are occasions on which the insurer is entitled to limitation of liability whereas the operator is denied the benefit of limitation. For example, if the damage occurred as a result of an act or omission by the operator himself, done deliberately with actual knowledge that pollution damage would result, the operator is not entitled to limitation of liability.⁷² In that situation, however, the insurer's right to limit his own liability - which should be distinguished from the operator's - remains unaffected. The operator's liability then becomes unlimited.

The present Article also has the effect that the insurer may avail himself of the defence that the pollution damage resulted from the wilful misconduct of the operator. This, together with the fact that the insurer's entitlement to limitation is unaffected, has contributed to the belief that the protection for the third parties under the present Article is in effect of no great significance. It might also be successfully argued that such an approach is not entirely consistent

72. Article 6.4 of the Convention.

with the reasoning on which direct action statutes are based.

E. Some observations on the insurance coverages
currently available

1. Essentials of the O.I.L. cover

Oil Insurance Limited (O.I.L.), a mutual insurance company, was formed in Bermuda in 1970 by a number of oil companies. The object was to provide reasonable and effective insurance and reinsurance coverage against certain risks in view of the fact that there was no longer available to the companies on terms consistent with sound business practice commercial insurance
73
covering such risks.

Pollution liability forms a substantial part of
74
the cover given by the O.I.L. policy. The provisions are worded in the following manner:

"3. To indemnify or pay or behalf of the Assured any sum or sums for which the Assured may be legally liable, or has agreed in writing prior to a loss

73. The Recital to the shareholders' agreement.

74. Apart from pollution liability under consideration, the undertakings include cost of control expenses and removal of debris expenses.

to assume for the benefit of others, excluding subsidiaries and affiliates, as a result of personal injury or bodily injury, including death, or loss of or damage to, including loss of use thereof, property of any kind or description other than property insured under insuring agreement 1 arising out of seepage, pollution or contamination caused by an occurrence, provided, however, coverage under this insuring agreement shall be in excess of the limits of all other of the Assured's insurance policies, which are then in force to insure its liability for seepage, pollution, or contamination." (Emphasis added)

It is the last sentence that merits attention. As a special feature, the present coverage is one of excess. This being the case, compensation is payable only if other insurance policies are exhausted in terms of amounts.

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As has been stated, the O.I.L. insurance is one of the methods in practice whereby the operator's obligation under OPOL can be covered. This may also serve to emphasise the sophistication of the coverage of pollution insurance.

While it is not proposed to analyse the present coverage in greater detail, one exclusion contained in

75. See above, pp. 296, 297.

the policy should however be mentioned. It is designed to exclude:

"With respect to insuring agreement 3, any liability of the Assured as an owner, operating agent of an owner, or bareboat charter of:

(1) watercraft classified as a tank vessel designed and constructed for the carriage by sea in bulk of crude petroleum and hydrocarbon fuels and oils derived therefrom; and

(2) vessels enrolled or eligible for enrolment in TOVALOP." (Emphasis added)

Effectively, this exclusion has no more significance than a confirmation of the proposition already put forward that the division between vessel-source pollution and seabed-source pollution can in no event be eroded for insurance purposes. To reiterate, the insurance covering vessel-source pollution is of an entirely different nature, the essentials of which have been briefly outlined.

2. Some important clauses of the Seepage, Pollution
76
and Contamination Insurance Policy

Apart from the Named Insured (the operator), the following parties are also insureds under the present

76. The writer is indebted to Mr. Michael Howard for a copy of the policy.

77
insurance:

"(b) The Contractors and/or Sub-contractors of the Named Insured and/or any parties whom the Named Insured has agreed to hold harmless in respect of liability for bodily injury and for loss of, damage to or loss of use of property or clean-up costs pursuant to operating agreements with such parties."
(Emphasis added)

As has been previously noted, the I.A.D.C. contract provides in clause 1005(b) that the operator should save the drilling contractor harmless from and against all claims arising from pollution.⁷⁸ To this extent, the provision quoted above in the present policy is indicative of the way oil-associated insurance and offshore operational practice inter-relate.

In the present context, those persons with whom the operator has concluded operating agreements could include the owners of supporting rigs like the Tharos,⁷⁹ and helicopters etc. It can therefore be assumed that

77. The Schedule to the policy.

The term "Insured" is further extended by virtue of clause 4(a) to include any partner or employees of the operator while acting within the scope of his duties as such.

78. See above, p. 274.

79. See above, p. 62, note 66.

the present policy is virtually for the benefit of all the persons involved in the operations. Be that as it may, it is felt that the operating agreements referred to in the policy are likely to be confused by the operating agreement entered into between the joint-venturers.

81

The cover afforded is in the following terms:

"INSURING AGREEMENTS:

Whereas the Insured has agreed to pay the premium as stated in the Schedule, Underwriters, subject to the limitations, terms and conditions of this policy, agree to indemnify the Insured against or pay on behalf of the Insured:

- (a) all sums which the Insured shall by law be liable to pay as damages for bodily injury (fatal or non-fatal) and/or loss of, damage to or loss of use of property caused by or alleged to have been caused directly or indirectly by seepage, pollution or contamination arising out of the operations stated in the Schedule.
- (b) the cost of removing, nullifying or cleaning up seepage, pollution or contaminating substances emanating from the operations stated in the Schedule, including the cost of preventing the substances reaching the shore.

Provided always that such Seepage, Pollution or Contamination results in a claim being made during

80. For operating agreements, see above, p. 65.

81. Clause 1 of the policy.

the period of Policy as stated in the Schedule and of which immediate notice has been given in accordance with Clause 5 hereof except that any claim subsequently arising out of the circumstances referred to in such notice shall for the purpose of this Policy be deemed to have been made during the currency of this Policy."

The fact that the policy is one of indemnity should be kept in mind in implementing the direct action rule which has been written into the 1976 Convention.

The terms seepage, pollution or contamination are nowhere defined in the policy. It remains to be seen whether problems of interpretation will arise therefrom.

The provisions dealing with limit of liability also merit a short consideration. Clause 2 states:

"LIMIT OF LIABILITY:

The Underwriters' limit of liability hereunder shall be ____ Ultimate Net Loss in respect of any one claim and/or series of claims arising out of one event and in the aggregate during the Policy period."

As defined in the policy, the term Ultimate Net Loss means "the sums paid in the settlement of claims covered by this Policy (after making deductions for all recoveries, salvages and other insurance) and shall include Costs and Expenses of litigation awarded to any claimant against the Insured."

82

It is important to bear in mind that such provisions will become subject to Article 8 of the 1976 Convention and the municipal law implementing the Convention once the Convention comes into force. Article 8 has already specified the minimum requirement, over which the operator and its underwriters will have little control.

The policy under consideration contains an exclusion,
 83
 which provides:

"This Policy does not cover any liability which is insured by or would, but for the existence of this Policy, be insured by any other existing insurance(s) except in respect of any excess beyond the amount which would have been payable under such other insurance(s) had this Policy not been effected."

It can be reasonably inferred that the thought behind the exclusion is to prevent double insurance. Difficulty might however arise as regards the applicable coverages under the present insurance and the O.I.L. policy when the two policies are co-existent. Nevertheless, a more considered view is that in that situation the present insurance should be the primary coverage if there are no other circumstances leading to a contrary conclusion. Support for the view can be extracted from the structures

83. Clause 8(b).

of the two policies. That the O.I.L. coverage is
⁸⁴
 one of excess is clear from its cover. By contrast,
 the provisions purporting to preclude double insurance
 in the present policy take the form of an exclusion
 rather than the cover, which can hardly be construed
 as an excess insurance.

The exclusion of cost of control is also inserted
⁸⁵
 in the present policy. It should be pointed out that
 cost of control is separate from, but related to,
 pollution liability. In brief, such cost refers to
 the expenses the operator incurs in regaining control
 of a well. To guard against the risk, a separate
 cost of control policy is in practice the most desirable
 answer.

In addition to the above, the following exclusion
 also calls for scrutiny. Clause 8(f) provides:

"This Policy does not cover any claims arising
 directly or indirectly from seepage, pollution or
 contamination if such seepage, pollution or
 contamination

(i) is intended from the standpoint of the

84. See above, pp. 313, 314.

85. Clause 8(b).

Insured or any other person or organization
 acting or on behalf of the Insured, or
 (ii)"

If the operator comes within the purview of this
 exclusion, the consequences are actually two-fold:
 not only can the underwriters disclaim their liability
 by virtue of this exclusion, but the operator could be
 denied the benefit of limitation of liability under
 the 1976 Convention.⁸⁶ In such a case, the operator
 would be exposed to unlimited liability without
 being protected by the insurance.

Under the present policy, it is warranted by the
 insured that blowout preventers be installed.⁸⁷ One
 should be reminded of the fact that such a warranty
 also exists in the policies covering offshore physical
 damage.⁸⁸ This is another sign, albeit minor, that oil-

86. Article 6.4 of the Convention.

87. Clause 14 of the policy.

88. See, for example, clause 9 of the London Standard
 Drilling Barge Form; clause 6 of the Norwegian
 DV-kasko. In the latter case, however, the re-
 quirement is considered a special safety regulation
 in relation to section 49 of the 1964 Plan. See
 above, pp. 249, 250.

related policies do have significant features in common despite their respective coverages.

F. Concluding remarks

With the conclusion of the 1976 Convention, OPOL may become obsolete. Although it will be some time before the impact of the Convention upon pollution insurance can be fully appreciated, it is precisely on this Convention and the municipal law implementing it that the operator and its underwriters should concentrate their attention. As the operator's obligation - whether under OPOL or not - is now coverable under certain specially-designed insurances, policies paralleling the Convention will no doubt be in great demand. At the time of writing, however, such policies are virtually non-existent.

CHAPTER SEVEN

CONCLUSION

This analysis hardly marks the end of the matter. Apart from the coverages discussed above, there are other respects in which the parties could be exposed to risk, such as loss of profits and political risks. With offshore technical marvels like floating airports being developed, it is natural that the challenges to lawyers and insurers are bound to continue. These are only a foretaste of the examples where much more consideration needs to be encouraged.

To conclude this work, a few final comments may be appropriate. As far as the insurance coverages are concerned, difficulties stem from a number of factors. One major cause of concern remains the underwriters' limited capacity on the risks, due to which many insureds have been unable to obtain adequate coverage. Ironically, with the policies involved being numerous, the indications are that duplicate insurance or overlapping between coverages has become another prominent issue. All this renders a co-ordinated offshore insurance framework essential for the maximisation

of insurance efficiency. It is proposed that there are four levels on which necessary co-ordination should be maintained. First of all, it would be incumbent upon the parties involved to distribute the duty to obtain insurance properly. This has been illuminated by the usual practice whereby the operator assumes the responsibility of purchasing insurance for other co-venturers. Another graphic example may be given of the contractual distribution of insurance coverages between the operator and the drilling contractor. It is however misleading to approach such contractual commitments without adequate consideration of the special legal requirements which may stipulate, for instance, that pollution insurance should be obtained by the operator only. Secondly, particular care is needed to ensure that coverages against different risks are parallel to each other. One practical illustration is the fact that oil-associated companies may choose to implement their employers' liability insurance separately or on a global basis. The latter may well entail double insurance when the companies insure their oil rigs with P & I clubs which also provide, among others,

employers' liability coverages. In considering pollution insurance, on the other hand, account must always be taken of the areas in which pollution liability coverages may have already been afforded to certain extent under the property damage policy or third party liability insurance. The third strand of the theory of co-ordination is that policies covering the perils of the same nature should be in perfect harmony with each other. To effect third party liability insurance, for example, the respective covers provided by the Comprehensive General Liability insurance and the P & I insurance should be adequately assessed as a basis for procuring the coverages intended. Fourthly, insurance coverages should echo the varying stages of the operations. For instance, insurance requirements of the exploratory activities are in no way identical to the coverages required during the construction period. As there are areas where these two sets of coverages inter-act, however, it is important not to consider each set of policies in isolation. Another obvious indication can be found in the C.I.C.M. insurance. As has been observed, coverages covering the production operations should

be complementary to the C.I.C.M. insurance in respect of the production phase.

Neither of these four tasks can be contemplated without the other. In achieving these aims, it is essential that each insurance policy should also be evaluated on its constituent merits. From a practical standpoint, the policies are ancillary to each other within the whole fabric of the insurance plan. Broadly speaking, there are no significant legal restrictions on the ways in which the insurance coverages are co-ordinated as proposed above, except that the Unfair Contract Terms Act 1977 has become an obstacle to the contractual distribution of the risks.

There is a great deal of evidence to suggest that the deficiency and inadequacy of the law have been exposed. The problems to which the legal status of offshore installations has given rise must be urgently examined. There could be nothing more vital than to clarify the confusion between such oil rigs and conventional ships or vessels. To do this would be a substantial step in rationalisation of the present state of the law, and is also a prerequisite of the reform in the law governing the insurance aspects of

oil rigs. On- the issue of the legal status, the conclusion must be that the analogy with ships or vessels is superficially attractive. Such an analogy could be justified in terms neither of reflecting the actual fact, nor of solving the problem. A more long-term view should be to accommodate and cater for the evolution of offshore technology, which is moving clearly in the direction of complicating the formation of offshore installations. As is clearly shown in the present discussion, the situation has already arrived in which any attempt to attach such novel designs to the notion of ships or non-ships has proved to be an over-simplification.

The supposition that offshore installations are independent of the concept of ships or vessels does not create the assumption that the rules of salvage and collision cannot be made applicable to such rigs. Nor is it legitimate to infer that rig owners should not be allowed to limit their liability. Nevertheless, this is not a generalisation which can necessarily be extended to other established maritime principles. In determining the applicability of those principles to oil rigs, many relevant factors should be taken

into consideration, as to which there are no easy answers.

The question of the governing law merits a fuller scrutiny than it has so far received. To reiterate, the arguments for bringing oil rig insurance within the purview of the 1906 Marine Insurance Act need to be squarely confronted. It seems reasonable to assume that to adapt oil rig insurance into conventional marine insurance concepts would be erroneous. In the absence of any solid legal ground, the mere fact that many insurance and legal practitioners involved in offshore activities have been frequently referring to the 1906 Act cannot be relied upon as evidence to validate the unqualified application of the Act to oil rig insurance. Nor can anyone credibly suggest that traditional marine insurance embraces oil rig insurance. In practical terms, the issue cannot be resolved simply by declaring that the Act should apply to oil rig insurance, unless balanced by more constructive provisions covering adequately the unique aspects of oil rig insurance.

Finally, it must be conceded that increased safety legislation has permitted considerable minimisation of

the risk. However minimal the practical significance of some regulations may be, their implications on oil-related insurance are never to be counted only in safety context. It is necessary to stress that any breach of the regulations on the part of the insureds could well establish a valid argument in favour of the underwriters. Seen in this light, it is important to prevent the reinforcement of safety regulations from going farther than is absolutely necessary. Arguably, the cumulative effects of the safety regulations tend to be advantageous to the underwriters at the insureds' expense. There appear to be instances where the insureds are placed in an unjustifiably vulnerable position. That is an injustice which should be remedied equitably.

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